87-2030

Supreme Court, U.S.
FILED
JUN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For a Writ of Certiorari to the Supreme Court of the State of North Carolina

---

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES
Paul J. Cambria, Jr., Esq.
Attorneys for Petitioner
One Niagara Square
Buffalo, New York 14202
(716) 849-1333

Counsel of Record

JAMES, McELROY & DIEHL
Edward T. Hinson, Esq.
600 South College Street
Charlotte, North Carolina 28202
(704) 372-9870

Of Counsel

Daily Record Corporation
Rochester, New York

(14671)

QUESTIONS PRESENTED

1. Did the Supreme Court of North Carolina misinterpret this Court's decision in *Pope v. Illinois*, ____U.S.____, 107 S.Ct. 1918 (1987), by determining that lower courts have discretion to decide whether juries should be charged that the value prong of the obscenity test is to be judged by a reasonable person standard?

2. In an obscenity prosecution, what are the guidelines and limitations governing admissibility of defense-proffered evidence of community standards relating to patent offensiveness, specifically, public opinion polls, ethnological studies and expert opinion testimony?

3. Did the misconduct of the prosecutor, including equating physical "unhealthiness" of anal intercourse with a definition of "prurient" as unhealthy, deprive the defendant of a fair trial?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT:	
I. THE SUPREME COURT OF NORTH CAROLINA HAS MISINTERPRETED THIS COURT'S DECISION IN *POPE V. ILLINOIS*, ___U.S.___, 107 S.CT. 1918 (1987), AND RULED THAT IT IS WITHIN THE TRIAL COURT'S DISCRETION TO DETERMINE WHETHER TO CHARGE THAT THE VALUE PRONG OF THE OBSCENITY TEST IS TO BE JUDGED BY A REASONABLE PERSON STANDARD	10
II. THE NORTH CAROLINA SUPREME COURT'S RESOLUTION OF THIS CASE EVIDENCES THE NEED FOR THIS COURT'S GUIDANCE IN DETERMINING ADMISSIBILITY OF DEFENSE-PROFFERED EXPERT TESTIMONY	13
A. North Carolina's Exclusion of the Ethnological Study Results and the Related Expert Testimony of Dr. Joseph Scott is in Conflict With the Directives of this Court	16

B. This Court Should Provide Guidance and Resolve Conflicts Regarding the Use of Public Opinion Polls Aimed at Assisting Juries in Determining Contemporary Community Standards in Their Consideration of the "Patent Offensiveness" of Allegedly Obscene Materials ... 22

III. THIS COURT SHOULD SEIZE THIS OPPORTUNITY TO CENSURE PROSECUTORIAL MISCONDUCT DESIGNED TO INCITE THE PREJUDICES AND FEARS OF THE JURY IN THE CONTROVERSIAL AREA OF OBSCENITY PROSECUTIONS 26

CONCLUSION 28

APPENDICES

OPINION OF THE NORTH CAROLINA SUPREME COURT (No. 8625SC792, slip opinion, April 3, 1987) A-23

OPINION OF THE NORTH CAROLINA COURT OF APPEALS (as reported at 354 S.E.2d 264)..... A-23

DR. WINICK'S CATAWBA COUNTY SURVEY QUESTIONS AND RESULTS EXCLUDED BY THE TRIAL COURT IN *STATE V. ANDERSON*.. A-34

DR. BELL'S ILLINOIS SURVEY QUESTIONS AND RESULTS (RULED ADMISSIBLE IN *PEOPLE V. NELSON*, 88 Ill.App.3d 196, 410 N.E.2d 476 [1980]) A-36

INDIANA SURVEY QUESTIONS (RULED ADMISSIBLE IN *SALIBA V. STATE*, 475 N.E.2d 1181 [Ind.App. 1985]) A-38

TABLE OF AUTHORITIES

	Page
Berger v. United States, 295 U.S. 78 (1935)	27
California v. Trombetta, 467 U.S. 479 (1984)	21
Carlock v. State, 609 S.W.2d 787 (Tex.Crim.App. 1980)	23, 25
Chambers v. Mississippi, 410 U.S. 284 (1973)	21
Chateau X, Inc. v. State ex rel. Andrews, 302 N.C. 321, 275 S.E.2d 443 (N.C. 1981)	5
Commonwealth v. Trainor, 374 Mass. 796, 37 N.E.2d 1216 (1978)	25
Commonwealth v. United Books, 389 Mass. 888, 453 N.E.2d 406 (1983)	15
Crane v. Kentucky, ___U.S.___, 106 S.Ct. 2142 (1986)	21
Flynt v. State, 153 Ga.App. 22, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888 (1980)	23, 24
Hamling v. United States, 418 U.S. 87 (1974)	12, 14
Jacobellis v. Ohio, 378 U.S. 184 (1964)	18
Kaplan v. California, 413 U.S. 115 (1973)	13, 16
Keller v. State, 606 S.W.2d 931 (Tex.Cr.App. 1980)	15
Miller v. California, 413 U.S. 15 (1973)	10, 11
New York v. Ferber, 458 U.S. 747, fn.12 (1982)	18
Parmelee v. U.S., 113 F.2d 729 (D.C. Cir. 1940)	15
People v. Nelson, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980)	23
People v. Sequoia Books, Inc., 160 Ill.App.3d 315, 513 N.E.2d 468 (Ill.App. 2 Dist. 1987)	13
Pope v. Illinois, ___U.S.___, 107 S.Ct. 1918 (1987)	9, 10, 28

Rock v. Arkansas, ____U.S.____, 107 S.Ct. 2704 (1987) 21

Saliba v. State, 475 N.E.2d 1181 (Ind.App. 1985)..... 23, 25

Smith v. California, 361 U.S. 147 (1959) 13, 14, 16

Smith v. United States, 431 U.S. 291 (1977) 18

State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E.2d 603 (1979) 5

State v. Anderson, ____N.C.____, 366 S.E.2d 459 (1988) 12, 23

State v. Feld, 155 Ariz. 88, 745 P.2d 146, n.1 (Ariz.App. 1987) 13

State v. Smith, 87 N.C.App. 217, 360 S.E.2d 495, (N.C.App. 1987) 13

U.S. v. One Reel of 35 mm Color Motion Picture Film Entitled "Sinderella", 491 F.2d 956 (2d Cir. 1974).... 14

United States v. Battista, 646 F.2d 237 (6th Cir. 1981)... 18

United States v. Manarite, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971)..... 14

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985)..... 18

United States v. Pryba, 678 F.Supp. 1225 (E.D.Va. 1988) 15

United States v. Various Articles of Obscene Merchandise, Schedule No. 2127, 705 F.2d 41 (2d Cir. 1984) .. 14

United States v. Various Articles of Obscene Merchandise, Seizure No. 182, 750 F.2d 596 (7th Cir. 1984) ... 14

United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983) . 15, 18

United States v. Young, 470 U.S. 1 (1985) 26, 27

United States v. 2,200 Paperback Books, 565 F.2d 566 (9th Cir. 1977)..... 15

IN THE

Supreme Court of the United States

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

The petitioner, Sharon Annette Hatfield Anderson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of North Carolina entered in the above-entitled proceeding on April 6, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Carolina is reported at 366 S.E.2d 459 and is reproduced in the Appendix, *infra*, at page A-1, *et seq*. The opinion of the North Carolina Court of Appeals is reported at 354 S.E.2d 264 and is printed in the Appendix at page A-23, *et seq*.

JURISDICTION

The Supreme Court of the State of North Carolina entered its opinion on April 6, 1988. This petition is filed within 60 days of that date. The opinion of the North Carolina Supreme Court constitutes a final judgment in a criminal case upholding the constitutionality of procedures involved in petitioner's conviction of a violation of North Carolina General Statutes §14-190.1. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS FROM NORTH CAROLINA RULES OF EVIDENCE

Rule 702. Testimony by Experts

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Rule 703. Bases of Opinion Testimony By Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or

inferences upon the subject, the facts or data need not be admissible in evidence.

NORTH CAROLINA OBSCENITY STATUTES

§14-190.1. Obscene literature and exhibitions

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene:

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class J felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband. (1971, c.405, s.1; 1973, c.1434, s.1; 1985, c.703, s.1.)

STATEMENT OF THE CASE

This case involves a criminal obscenity prosecution under North Carolina's recently enacted anti-pornography statute. N.C.G.S. §14-190.1. For more than a decade prior to the effective date of the new law, there were virtually no obscenity prosecutions in that state because of a now defunct requirement of an adversary hearing prior to prosecution. Currin & Showers, *Regulation of Pornography — The North Carolina Approach*, 21 Wake Forest L. Rev. 263 (1986). In fact, research reveals that there were only two reported cases involving prosecutions for obscenity in North Carolina in that decade,* as opposed to nine reported in the two and one-half years since the law took effect.

The defendant in this case was arrested just days after the new law took effect; her case was the first criminal prosecution to subsequently exhaust the appellate process in North Carolina. Thus, the decision sought to be appealed is serving as the guiding precedent for a renewed and vigorous obscenity prosecution agenda in that state.

---

* The cases uncovered are: *Chateau X, Inc. v. State ex rel. Andrews*, 302 N.C. 321, 275 S.E.2d 443 (N.C. 1981), and *State ex rel. Andrews v. Chateau X, Inc.*, 296 N.C. 251, 250 S.E.2d 603 (N.C. 1979).

Petitioner Sharon Annette Hatfield Anderson, then a 21-year-old store clerk, was arrested on October 9, 1985, in Catawba County, North Carolina. She was charged with disseminating obscenity for her sale of a total of four magazines on two consecutive dates to a local police investigator.

At the trial of this action, the State's case-in-chief consisted of calling two witnesses, the officers who had been involved in identifying the defendant and purchasing the magazines. In addition, the magazines themselves were introduced into evidence.

The defense commenced its proof by calling Professor Joseph Scott, a sociologist with a background in statistical methodology, to advise the jury of his opinion as to whether the average person applying contemporary community standards would find that the subject materials were patently offensive and exceeded the community level of tolerance or acceptance for such materials. Dr. Scott testified at length as to his qualifications and credentials, which included his recent completion of a research project which tracked the consumption of adult magazines for each state in the nation.

Dr. Scott testified that he performed an ethnological study of the county in which this prosecution arose. In that regard, he studied availability, accessibility and consumption of adult materials in general, as well as of materials similar to those on trial. His study included determining consumption rates and speaking to store clerks from convenience stores to adult establishments where these materials were sold to determine the attitudes of purchasing and non-purchasing patrons, as well as visiting local newspapers and reading through letters to the editor. He testified that these procedures were all part of the accepted methodology for conducting an ethnological study to determine contemporary community standards regarding adult materials.

After the defense had established this foundation, the court refused to allow Dr. Scott to submit to the jury figures and consumption rates for similar adult materials in the county. It also precluded him from advising the jury as to whether, in his expert opinion, the contents of the subject magazines exceeded the community level of tolerance for such adult materials.

Subsequently, the defense tendered to the court the expert testimony of Dr. Charles Winick, a renowned expert in the fields of obscenity statistics and surveying, to assist the jury in its determination of whether the average adult, applying contemporary community standards, would find that the subject materials were patently offensive and exceeded the community level of tolerance or acceptance for such materials. Dr. Winick advised the court as to his lengthy credentials, which included conducting surveys for the Presidential Commission on Obscenity, publishing over 400 articles and 20 books regarding sexually related matters, and acting as an advisor to the Office of the United States Attorney and the Attorney General of the State of New York. Dr. Winick testified that he had taught survey methods for 35 years and that his work with surveys included projects with such individuals as Gallop, Roper and Harris.

In his proffer, Dr. Winick explained at length the typical methodology employed in conducting public opinion polls and further described the particular methodology with which, using the charged materials as a guide, he developed and conducted a poll for the instant action dealing with acceptance or tolerance of sexually explicit magazines in Catawba County. After setting forth this foundational basis, the doctor tendered to the court the results of his survey conducted especially for this case. The court refused admission of all but the results of two of the survey questions.

Dr. Wheeler, a marital family therapist and sex therapist was also called by the defendant. After a lengthy proffer, Dr. Wheeler was allowed to testify that, in his opinion, the average adult applying contemporary community standards would not be stimulated by these materials in a prurient fashion.

The defendant also testified in her own behalf. She explained that she was the mother of a two-year-old son and had recently moved to North Carolina. She had taken a job as a cashier at the Imperial Popular Newsstand to support her child in September of 1985, approximately one month before her arrest. The defendant explained that she was not aware of the contents of the sealed magazines at issue and that in fact she did not recall the sales for which she was charged or the subject magazines.

In summation, the prosecutors repeatedly injected their personal opinions as to the magazines over consistently overruled defense objections. When one of the prosecutors addressed the issue of whether the materials appealed to a prurient interest in sex, he argued that the magazines must be obscene, because ". . . what is more unhealthy than anal intercourse? How could it be anything but obscene?" An unsuccessful objection to these comments was interposed, as defense counsel believed that the comment unfairly conjured up thoughts of biological health and even such a volatile red herring as AIDS; the objection was overruled. Thereafter, the court instructed the jury that prurient interest meant an "unhealthy" and "morbid" interest in sexual conduct.

In addition, the court introduced its explanation of the tripartite test for obscenity by stating that the material must be judged with reference to ordinary adults applying community standards. It then repeated that standard in its discussion of the first two elements; it did not explicitly instruct the jury as to what standard was to be applied to the third or "value" prong of the test.

After deliberations, the jury returned a verdict acquitting defendant of disseminating obscenity for two magazines entitled *Jets of Jizz* and *Super Sex Stars #1*. However, it convicted her of two counts of disseminating obscenity for the two magazines entitled *Ass Masters, Special #4*, and *Ass Masters, Special #3*.

The following day Judge Robert Lewis sentenced defendant to a term of imprisonment of three years on each count. Execution of the sentence was suspended, and the defendant was placed on supervised probation for five years with an active prison term of six months in the custody of the North Carolina Department of Corrections. A $10,000.00 fine was also imposed. The sentence was stayed pending appellate review.

On appeal to the North Carolina Court of Appeals, petitioner raised a number of issues including the improper exclusion of expert testimony. The judgment of the trial court was thereafter reversed upon that court's determination that the expert testimony of Dr. Joseph Scott was improperly excluded. Specifically, the court determined that through his study, Dr. Scott acquired specialized knowledge of contemporary community standards with respect to adult materials and that the jury was entitled to hear and then accept or reject his opinion as to whether the challenged materials would be patently offensive to the average person in the community.

Subsequently, the Supreme Court of North Carolina accepted the case for review. In the interim between the decision of the Court of Appeals and that acceptance, this Court issued its opinion in *Pope v. Illinois*, ____U.S.____, 107 S.Ct. 1918 (1987). Thus, petitioner's brief to that court included a challenge to the propriety of the trial court's instruction to the jury with respect to the value prong of the obscenity test.

The Supreme Court ultimately reversed the intermediate appellate court's determination and reinstated petitioner's convictions. In doing so, it held that the trial court properly excluded the testimony of Dr. Scott as well as that of Dr. Charles Winick and that no prejudicial prosecutorial misconduct occurred. The court also determined that the trial court's charge regarding the value prong was not contrary to the dictates of *Pope v. Illinois*, ____U.S.____, 107 S.Ct. 1918 (1987), since charging the standard articulated in *Pope* was a matter of discretion with the trial court.

The petitioner's sentence has been stayed by the state court pending determination of her request for further review by this Court.

REASONS FOR GRANTING THE WRIT

I

THE SUPREME COURT OF NORTH CAROLINA HAS MISINTERPRETED THIS COURT'S DECISION IN *POPE V. ILLINOIS*, ____U.S.____, 107 S.CT. 1918 (1987), AND RULED THAT IT IS WITHIN THE TRIAL COURT'S DISCRETION TO DETERMINE WHETHER TO CHARGE THAT THE VALUE PRONG OF THE OBSCENITY TEST IS TO BE JUDGED BY A REASONABLE PERSON STANDARD.

In *Pope v. Illinois*, ____U.S.____, 107 S.Ct. 1918, this Court recently reaffirmed that the third, or "value," prong of the *Miller v. California*, 413 U.S. 15 (1973), test for obscenity is not to be gauged by contemporary community standards. Stressing that majority approval of a work is not necessary to merit First Amendment protection, it determined that in judging value, the

"proper inquiry is . . . whether a reasonable person would find . . . value in the material, taken as a whole." *Id.* at ____, 107 S.Ct. at 1921. The Court then determined that the error which results from the failure to give the correct jury instruction on this aspect of the *Miller* test could be subjected to harmless error analysis.

In a footnote to its holding that the reasonable person standard should be applied to the value issue, the Court rejected the State of Illinois' argument that such a standard would confuse the jury:

> Of course, as noted above, the mere fact that only a minority of a population may believe a work has serious value does not mean the "reasonable person" standard would not be met.
>
> The State contends that without an instruction to apply contemporary community standards the jury will be at a loss as to how to decide the value issue. Brief for Respondent, 21. In an obscenity prosecution the trial court, *in its discretion*, could instruct the jury to decide the value question by considering whether a reasonable person would find serious literary, artistic, political, or scientific value in the work, taken as a whole. Such an instruction would be no more likely to confuse a jury than the "reasonable man" instructions that have been given for generations in other contexts, such as tort suits.
>
> The State also suggests, in attempting to justify the use of a "community standards" instruction on the value question, that such an instruction is the functional equivalent of a "reasonable man" instruction. *Id.*, at 16. The risk, however, is that under a "community standards" instruction a jury member could consider himself bound to follow prevailing local views on value without considering whether a reasonable person would arrive at a different conclusion. *Id.* at ____, 107 S.Ct. at 1921, n.3 (emphasis supplied).

Seizing upon the highlighted phrase in this footnote, the North Carolina Supreme Court interpreted this Court's intention to be

that the "decision in any given case as to whether to instruct the jury to apply the reasonable person test . . . is a matter of discretion of the trial court." *State v. Anderson* (A-21, *infra*). Following that interpretation to its ultimate conclusion, the North Carolina Supreme Court, in essence, has held that the trial court can exercise its discretion to refuse to charge the jury as to the reasonable person standard, even in response to a specific defense request for the proper instruction.

Defendant contends that *Pope* was not intended to and does not support that erroneous conclusion. Rather, in context, the "discretion" language in footnote three in *Pope* was intended to introduce a suggested wording of an appropriate instruction incorporating the proper reasonable person standard. Thus, it signified that this Court's wording of the charge was illustrative only and could be altered in the trial court's discretion, not that the decision whether to charge the correct standard at all was a discretionary matter.

The contrary interpretation adopted by the North Carolina Supreme Court conflicts with both the spirit and legal grounding for the *Pope* decision. Throughout *Pope*, this Court emphasized that the value prong must not be judged by contemporary community standards; its previous opinions had conclusively determined that the personal and collective opinions of the jury members were also not the appropriate yardstick. *See, e.g., Hamling v. United States*, 418 U.S. 87, 107 (1974). Yet, if a trial court, in its discretion, can refuse to charge the proper reasonable person standard, it can effectively ensure that the jury applies one of those standards by default or through confusion with the contemporary community standard relevant to the other two prongs of the *Miller* test.

Moreover, by its interpretation, North Carolina has adopted the senseless position that legal tests and standards deemed constitutionally necessary by this Court to protect vital First Amend-

ment interests need not be imparted to the jury. Law which need not be charged to or applied by a fact finder is not law at all, but empty pontification.

Thus far, courts appear to have interpreted and/or applied *Pope* consistent with defendant's position by assuming the reasonable person standard to be the correct and required one for judging value and, if such an instruction was not given, remanding or reviewing for consideration of the harmfulness of the error. *See, e.g., State v. Feld*, 155 Ariz. 88, 745 P.2d 146, 149, n.1 (Ariz.App. 1987); *People v. Sequoia Books, Inc.*, 160 Ill.App.3d 315, 513 N.E.2d 468, 473 (Ill.App. 2 Dist. 1987); *State v. Smith*, 87 N.C.App. 217, 360 S.E.2d 495, 500 (N.C.App. 1987). However, the danger exists that other jurisdictions will join North Carolina in misinterpreting this Court's opinion in *Pope* or follow its lead. Accordingly, this Court is requested to accept this case for review to clarify the ambiguity in *Pope* perceived by the North Carolina Supreme Court and to correct that court's misinterpretation of the degree of discretion committed to trial courts to charge the correct legal standard on the vital value prong of the *Miller* test.

II

THE NORTH CAROLINA SUPREME COURT'S RESOLUTION OF THIS CASE EVIDENCES THE NEED FOR THIS COURT'S GUIDANCE IN DETERMINING ADMISSIBILITY OF DEFENSE-PROFFERED EXPERT TESTIMONY.

Not since its review in *Kaplan v. California*, 413 U.S. 115, 121 (1973), and *Smith v. California*, 361 U.S. 147, 160 (1959), has this Court considered the admissibility of expert testimony in the obscenity area. In each of those cases, this Court only scratched the surface of a defendant's due process right to introduce expert testimony on his own behalf in these mercurial and controversial

prosecutions. Thus, these decisions have provided a dim beacon to guide other courts in evaluating the admissibility of expert testimony on obscenity issues. As a result, lower courts have strayed in different directions in their attempts to evaluate the admissibility of defense-proffered testimony, some determining such evidence should be totally excluded and others allowing its admission.

Throughout the years, defendants have explored different ways of presenting expert testimony on contemporary community standards as it applies to the patent offensiveness prong of the *Miller* test. Some have attempted to present evidence regarding general availability and widespread patronage of the same or similar works to show acceptability or tolerance of the work as opposed to mere availability. The basis for such evidence was spurred by Justice Harlan's statement in *Smith v. California* that "the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates." *Id.* at 171. Defendants have, therefore, specifically argued that due process requires that a litigant have the opportunity to introduce proof on the issue of the limits of candor set by contemporary community standards.

In response to defense proffers, this Court and others have determined that evidence of "mere availability" of a work or similar works does not demonstrate acceptance by the average member of the community. *Hamling v. United States*, 418 U.S. at 125-126; *United States v. Various Articles of Obscene Merchandise, Schedule No. 2127*, 705 F.2d 41, 44 (2d Cir. 1984); *U.S. v. One Reel of 35 mm Color Motion Picture Film Entitled "Sinderella"*, 491 F.2d 956, 958-959 (2d Cir. 1974); *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971). Other courts, however, have recognized that *widespread* community *availability and patronage* of such works may be accepted as circumstantial evidence of contemporary community standards. *United States v. Various Articles of Obscene Merchandise, Seizure No. 182*, 750 F.2d 596 (7th Cir. 1984); *United States v. Vari-*

ous Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983); *United States v. 2,200 Paperback Books*, 565 F.2d 566, 571 (1977); *Keller v. State*, 606 S.W.2d 931, 933 (Tex.Cr.App. 1980). As reasoned by the court in *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, supra* at 137, "at some point a work widely available must be considered inferentially acceptable," and the "weight to be given to wide availability rests with the trier of fact."

Other defendants have attempted to introduce qualitative expert testimony on community standards and value. For example, in *Commonwealth v. United Books*, 389 Mass. 888, 453 N.E.2d 406 (1983), the expert had studied erotic art, watched films at the "Fine Arts Theater," purchased magazines from a convenience store, read several treatises on pornography and, based upon his professional training, experience, research, study and investigation, was familiar with contemporary trends and attitudes toward the depiction of sexual conduct in Massachusetts. Based on the trial court's exclusion of such evidence, the Supreme Court of Massachusetts reversed the conviction. *But, see, United States v. Pryba*, 678 F.Supp. 1225 (E.D.Va. 1988) (wherein the trial court rejected a qualitative analysis of a community conducted through an ethnographic study — a method used to assess community standards.)*

Lastly, defendants, with varying results, have attempted to introduce results of public opinion polls designed to measure contemporary community standards and the patent offensiveness *vel non* of a particular work. *See*, §B, *infra*.

---

* In *Parmelee v. U.S.*, 113 F.2d 729 (D.C. Cir. 1940), Schroder's "Obscene Literature and Constitutional Law (1911) c. XIII, Ethnographic Study of Modesty and Obscenity" was cited as evidence of the view of social scientists that nudity is not obscene *per se*.

In the case at bar, two separate attempts were made by the defendant to proffer expert testimony regarding contemporary community standards as applied to the patent offensiveness prong. These attempts addressed each of the aforecited methods of measuring contemporary community standards but were completely rebuffed by the court below. In the first instance, the defense attempted to introduce an ethnological study of the community which investigated what people were doing and saying with regard to the subject of sexual materials and determined what materials were widely available, accessible, and consumed in the community at large. In addition, the defense also proffered a second expert who had conducted a quantitative study (i.e., a public opinion poll or survey) of the community to aid the jury in a determination of the issue of whether the materials depicted or described sexual conduct in a patently offensive manner.

A. North Carolina's Exclusion of the Ethnological Study Results and the Related Expert Testimony of Dr. Joseph Scott is in Conflict With the Directives of this Court.

This Court has recognized the defense right to introduce appropriate expert testimony in obscenity cases. *Kaplan v. California*, *supra* at 121 (1973). As stated by Justice Frankfurter:

> [It is] the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts. . . [T]o exclude such expert testimony is in effect to exclude as irrelevant evidence that goes to the very essence of the defense and therefore to the constitutional safeguards of due process. *Smith v. California*, *supra* at 164-65 (1959) (Frankfurter, J., concurring).

Through the testimony of Dr. Joseph Scott, a renowned expert in the fields of statistics and adult material consumption, the de-

fense attempted to proffer to the jury an ethnological study relating to contemporary community standards and expert opinion testimony based on that study.

Dr. Scott's testimony and the basis for it were offered under North Carolina Rules of Evidence 702 and 703, which are virtually identical to the corresponding Federal Rules of Evidence.*

The ethnological study was designed to measure local community tolerance/acceptance of adult materials.* Dr. Scott testified that he visited 38 locations where adult magazines were sold in the county in which the prosecution arose, including pharmacies, convenience stores, gas stations, and others. At those locations,

---

* The only distinction between the parallel rules in the omission of the words "or otherwise" at the conclusion of N.C.R.Evid. 702. Thus, an expert's opinion is admissible even if the underlying data itself is inadmissible, as long as the data is of a type reasonably relied upon by experts in the field. Fed.R.Evid. 703; N.C.R.Evid. 703. Dr. Scott testified that the ethnological method he employed is an accepted procedure relied upon by experts in community tolerance research. The State offered no evidence to rebut that testimony.

he looked at the magazines displayed, conversed with the clerks as to the opinions of these adult materials as expressed by purchasing and nonpurchasing patrons (i.e., whether patrons objected to this type of material being displayed) and inquired as to the quantities of magazines sold.

As part of his study, Dr. Scott explained that he also conducted a study to determine the circulation of adult materials in the county as compared to North Carolina and the United States as a whole. To accomplish that end, he conferred with the major distributor of all magazines in the area. This inquiry centered on the

---

* Both the trial and intermediate appellate courts expressed confusion over the applicability of "toleration" versus "acceptance" as the measuring stick for evaluating contemporary community standards, as suggested by the language of this Court in *New York v. Ferber*, 458 U.S. 747, 761, fn.12 (1982) ("It would be equally unrealistic to equate a community's *toleration* for sexually oriented material with the permissible scope of legislation aimed at protecting children from exploitation."). Confusion as to the correct standard is an additional reason for this Court to accept this case for review. *See, Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Communities vary in their *toleration* of alleged obscenity); *Smith v. United States*, 431 U.S. 291, 300-301 (1977) (our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable). *See, also, United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985) (a key issue in any obscenity case is the degree of community *acceptance or tolerance* of materials similar to those at issue); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983) (to arrive at a measure of community tolerance of pornographic material the trier must decide what most people seem to think about such materials). *Compare, United States v. Battista*, 646 F.2d 237 (6th Cir. 1981) (*acceptance, not tolerance*, is the proper measure).

number of outlets in the county selling magazines and the percentage of those carrying adult items. Dr. Scott likewise visited numerous video outlets and adult bookstores in the county to determine the availability of adult video tapes, how often they were rented, the demand for such films, what type of people were renting the films, and what portion of the entire business of these establishments was made up of adult materials. Additionally, he visited the local cable company to determine the number of subscribers to the adult movie channel.

Dr. Scott watched the television station playing adult movies, visited local bars which featured topless dancers and talked with the editor of two area newspapers. He testified that he read through each and every page of the paper from January 1, 1985, through October of 1985 to determine the number and content of letters to the editor on the subject of pornography which, Dr. Scott testified, is a good measuring device on issues concerning the community. He did not find one letter to the editor on this subject in that time span.

Moreover, Dr. Scott testified that he calculated the consumption rates for the magazines in question by reviewing the official records from the Audit Bureau of Circulation and calculating the consumption for the county at issue compared to North Carolina and the United States. He found that the consumption rate for this county was considerably higher than the norm for these magazines.

Through Dr. Scott, the defense attempted to establish for the jury a working knowledge of: the widespread acceptability of similar sexually explicit materials in the county from adult bookstores to local gas stations; the specific acceptability of the magazines in question by comparing consumption rates obtained from the Audit Bureau of Circulation, as well as comparative distribution figures of similar sexually explicit materials in Catawba County versus the State and Nation; the opinions of area resi-

dents regarding pornography as revealed by local newspapers and as noted by store clerks from convenience stores to adult bookstores through their contact with purchasing and nonpurchasing patrons; and the community's acceptance/tolerance of local adult movie channels broadcasting materials with the same or similar contents.

After laying this foundation under the North Carolina analogue to Fed.R.Evid. 703, defense counsel attempted to submit to the jury through Dr. Scott figures and consumption rates for such materials in the county. This testimony was rejected by the court. Similarly, defense counsel tried to elicit for the jury Dr. Scott's opinion of contemporary community standards as it applied to the issue of patent offensiveness (i.e., whether the subject materials exceeded the community level of acceptance/tolerance of such materials and thus were patently offensive). This testimony was also excluded.

The Supreme Court of North Carolina, in reviewing this case, ostensibly applied the standard for admission of expert testimony which prevails under its counterpart to Fed.R.Evid. 702, i.e., whether the testimony would be helpful to the jury. However, it determined that the trial court's discretion permitted rejection of the evidence on the ground that it "was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive material which [Dr. Scott] described as 'adult material'." The court found the study "too unfocused and unspecific" to provide a sufficient basis to give an expert opinion regarding whether the average adult applying contemporary community standards would find the precise magazines at issue to be patently offensive.

The entire thrust of the court's argument, however, went to the weight to be accorded such evidence, not its admissibility.* The Supreme Court completely overlooked the expert's proposed testimony regarding the consumption rates for the materials in question and the fact that similar items were found from one end of the county to the other in local convenience stores as well as adult establishments and were being consumed in large numbers.

The impression and direction left by this case is that courts, in deciding on admissibility of evidence in an obscenity case, may exclude such testimony by scrutinizing the underlying assumptions, the inferences drawn and the conclusions reached under the guise of evaluating admissibility when, in actuality, the criticisms go only to the weight to be accorded the testimony. Instead of resolving doubts as to the usefulness of such evidence in favor of admissibility, courts are now free to exclude expert evidence with a liberal hand on the basis of considerations which should be within the province of the jury, not the court. The result is that the jury is deprived of the assistance the evidence could offer on the nebulous concept of "contemporary community standards," and the defendants are denied a meaningful opportunity to present a complete defense. *See, e.g., Crane v. Kentucky*, ____U.S.____, 106 S.Ct. 2142 (1986); *California v. Trombetta*, 467 U.S. 479 (1984).

Where, as here, evidence which is relevant to a fair determination of the cause is excluded from the jury's consideration at trial, due process concerns compel this Court's intervention. *See, Chambers v. Mississippi*, 410 U.S. 284 (1973); *cf. Rock v. Arkansas*, ____U.S.____, 107 S.Ct. 2704 (1987). Moreover, this Court's

---

* Although the State Supreme Court made reference to exclusion of such testimony under Rule 403 (probative value versus confusion of issues or misleading the jury), the trial court made no mention of excluding the testimony on such grounds. Rather, the exclusion was based solely on relevancy grounds and the court's belief that Dr. Scott had no basis upon which to state an opinion.

consideration of this issue under the relaxed rules of admissibility established by the relatively new Federal Rules of Evidence would render especially valuable guidance to trial and appellate courts. The vast majority of jurisdictions now apply the Federal Rules either wholly or in a substantially similar form.*

B. This Court Should Provide Guidance and Resolve Conflicts Regarding the Use of Public Opinion Polls Aimed at Assisting Juries in Determining Contemporary Community Standards in Their Consideration of the "Patent Offensiveness" of Allegedly Obscene Materials.

In its next attempt to place before the jury some evidence on which it could gauge the appropriate contemporary community standard, the defense proffered Dr. Charles Winick. Dr. Winick, one of the foremost national authorities in the field of survey research, was called to testify to the results of a public opinion poll he had conducted on the community's acceptance or tolerance of sexually explicit materials such as those in issue. This evidence, too, was offered to assist the jury in the difficult task of applying an objective community standard in determining whether the charged materials were "patently offensive."**

The questions contained in this survey were aimed at determining whether the members of the community of Catawba County, North Carolina, found it acceptable for those in the community who so chose, to view materials depicting exposure of the genitals

---

* In addition to all federal jurisdictions, most states now follow the Federal Rules of Evidence. In particular, 28 states have adopted a rule which is identical to Fed.R.Evid. 702, while two, plus Puerto Rico, follow similar versions. Likewise, 27 states adhere to a rule identical to Fed.R.Evid. 703 and three others, plus Puerto Rico, have adopted similar versions.

** There were no challenges at trial to either the expert's credentials or his methodology in conducting this survey. The expert testified that the survey properly measured the issues represented by the patent offensiveness prong of *Miller*.

and every kind of sexual activity, no matter how graphically depicted.* The sexual activities depicted in the four magazines at issue in this case clearly were encompassed by this question, and the results showed that an overwhelming majority of those polled found such depictions of sexual conduct acceptable and hence not patently offensive.

The specific questions in the instant poll are nearly identical to those contained in public opinion surveys conducted for use in various obscenity trials throughout the nation. However, state courts have split on the admissibility of such surveys on the question of community standards. Appellate courts in *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 (1980); *Saliba v. State*, 475 N.E.2d 1181 (Ind.App. 1985);** and *Carlock v. State*, 609 S.W.2d 787 (Tex.Crim.App. 1980), have admitted such survey results, while the results of similar public opinion polls have been held inadmissible in the instant case and in *Flynt v. State*, 153 Ga.App. 22, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888 (1980), where the Georgia Court of Appeals found that the results of a substantially similar survey were properly excluded from introduction at trial.

Here, the trial court excluded from introduction into evidence the responses to questions three through six of the proffered survey results. The North Carolina Supreme Court concluded that the trial court properly excluded the results of the survey with regard to the specific questions, because the "questions amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. §14-190.1 [the North Carolina Obscenity Statute]." *State v. Anderson*, ____N.C.____, 366 S.E.2d 459 (1988). The court determined that the cumulative results to

---

* The questions and responses to the survey, as entered in the record below, are reproduced for the Court's convenience in the appendix hereto at A-34, *infra*.

** The questions and responses in the Illinois and Indiana surveys are reproduced for the Court's convenience in the appendix hereto at A-36, *infra*.

these specific questions "would not assist the jury" in applying contemporary community standards when considering whether the magazines were patently offensive. Likewise, in the *Flynt* case, the Georgia Court found that a similar survey "asked no more than whether the respondents objected to the dissemination of materials depicting nudity and sex to willing adults, not whether they regarded the materials such as that depicted in appellant's magazines as obscene in themselves." *Flynt*, *supra* at 672.

However, the *Nelson* court, recognizing that a community standard based upon public acceptance of material claimed to be obscene is an essential element of proof, determined that the survey results proffered were valid in describing attitudes of adults about the acceptability or nonacceptability of sexually explicit materials. The court further found the questions relevant, since members of the public were asked to state whether they felt it would be acceptable for the average adult in Illinois to see or buy sexually explicit materials. Since the charged materials contained "nudity and actual or pretended sexual activities defined as sexual intercourse including all kinds of sexual variations" and that the questions specifically contained a definitional section asking the interviewees if this was their understanding of the questions proffered (*see*, Dr. Bell's Illinois survey questions and results, A-36, *infra*), the court determined that the results of the survey weighed heavily against a finding that the movies were patently offensive.

As stated by the *Nelson* court:

> ". . . the survey results are strong evidence that the community standards would accept or at least would not reject portrayal of sexually explicit materials in movies if limited to adult viewers. In fact, survey evidence may be the only way to prove degrees of acceptability of a product or material, as

distinct from its availability."

Nelson, supra, at 479.

Similarly, the Indiana Court in *Saliba, supra*, acknowledged a defendant's right to offer to the jury survey evidence regarding contemporary community standards and further noted the desirability of such evidence in obscenity cases.

> "Expert testimony based on a public opinion poll is uniquely suited to a determination of community standards. Perhaps no other form of evidence is more helpful or concise: 'a properly conducted public opinion survey itself adequately insures a good measure of trustworthiness, and its admission may be necessary in the sense that no other evidence would be as good as the survey evidence or perhaps even obtainable as a practical matter.' " *Id.* at 1185, citing *Commonwealth v. Trainor*, 374 Mass. 796, 37 N.E.2d 1216, 1221 (1978).

In *Carlock v. State, supra*, a Texas appellate court, operating under a rule identical to Fed.R.Evid. 702, found that the defendant's public opinion survey offered as evidence of contemporary community standards was improperly excluded since it was "relevant to the determination of a material fact in issue." *Id.* at 789. Furthermore, the court concluded that although the survey dealt with general opinions regarding obscenity rather than the community's opinion of the particular magazines in question, the exclusion of the survey results was nevertheless improper. Any weaknesses in the defendant's survey affected only the weight to be accorded the survey results rather than the admissibility of the survey itself. *Id.* at 790.

The patent offensiveness test should be an objective test of community standards. By requiring jurors to establish and apply contemporary community standards without permitting defendants to introduce evidence of contemporary community standards as it relates to the materials' patent offensiveness, the North Carolina and Georgia courts leave jurors little option but to either guess at

the contemporary community standards to be applied or to apply their own. In the absence of clear guidance from this Court on the admissibility of public opinion surveys as evidence on the issue of contemporary community standards, defendants charged with obscenity will continue to be at a loss as to what evidence can be offered on the difficult but crucial issue of contemporary community standards as they relate to the "patent offensiveness" of the materials alleged to be obscene.

III

THIS COURT SHOULD SEIZE THIS OPPORTUNITY TO CENSURE PROSECUTORIAL MISCONDUCT DESIGNED TO INCITE THE PREJUDICES AND FEARS OF THE JURY IN THE CONTROVERSIAL AREA OF OBSCENITY PROSECUTIONS.

The tactics employed by the prosecutors during summation were highly inflammatory and prejudicial, exceeding the bounds of legitimate advocacy and depriving defendant of her right to a fair trial. These included the repeated injection of personal opinion, a tactic which is manifestly improper and has been condemned as such by this Court on other occasions. *See, e.g., United States v. Young*, 470 U.S. 1, 18 (1985).

However, one of the prosecutors also employed a novel, but also extremely prejudicial and inflammatory approach by setting forth his contentions, over defense objection, that the physical act of anal intercourse was "unhealthy" and therefore obscene.

The prosecutor's irrelevant description of the act of anal intercourse as "unhealthy" immediately followed his comments on whether the charged materials appealed to a prurient interest in sex, which the court's subsequent charge defined as an "unhealthy" interest in sex. These remarks could have only misled

and confused the jury in its attempt to apply this prong of the *Miller* test. The prosecutor's interjection of his personal opinion of the "unhealthy" nature of anal intercourse was designed to leave an impression with the jury that the test to be applied was a rather simple one: anal intercourse equals unhealthy conduct and, thus, the materials are obscene.

The inflammatory nature of this type of remark is exacerbated in light of the concern today over the much publicized disease of AIDS. The practice of anal intercourse has been identified by authorities as one of the means of transmission of this deadly virus, and the prosecutor's irrelevant expression of his personal opinion that the physical act is "unhealthy" undoubtedly distorted and inflamed the issue by planting the seed in the minds of the jury of the "unhealthiness" of the physical act in light of AIDS.

Admission of prosecutorial opinions has long been held to violate a defendant's constitutional right to be tried solely on the basis of the evidence presented to the jury and therefore is prohibited. *Berger v. United States*, 295 U.S. 78 (1935). This is especially true because, as this Court has recently recognized, statements by the prosecutor carry with them the "imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence." *United States v. Young*, *supra* at 18-19. Here, the end result of the prosecutor's prejudicial comments was a complete distortion of the obscenity test and a misleading of the jury into the belief that anal intercourse was unhealthy (i.e., prurient) and therefore obscene.

This Court should address and condemn this type of prosecutorial technique in obscenity trials. Where the term "unhealthy" is frequently used to define "prurient", an essential term in the application of the *Miller* test to sexually explicit material, and where specific physical sexual acts may be perceived as "unhealthy" in light of the AIDS epidemic, prosecutors must be precluded from

confusing and inflaming the issues by any improper and irrelevant references to the "unhealthy" nature of any sexual acts.

CONCLUSION

This case presents this Court with an opportunity to consider three reoccurring and problematic issues in obscenity prosecutions. First, the Supreme Court of North Carolina has clearly misinterpreted the recent decision in *Pope v. Illinois*, *supra*, with the result that defendants in that state are not entitled to have their guilt or innocence judged by the standard deemed constitutionally necessary by this Court.

Although this Court has determined that the right of the defense to present expert testimony is a matter of constitutional dimension; it has not established guidelines for admissibility of such evidence. North Carolina's exclusion of two separate, distinct categories of expert testimony provides this Court with an excellent opportunity to provide the needed direction.

Finally, this Court has not considered prosecutorial misconduct issues uniquely related to the obscenity issue.

DATED: Buffalo, New York
June 2, 1988

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
PAUL J. CAMBRIA, JR., ESQ.
Attorneys for Petitioner
One Niagara Square
Buffalo, New York 14202
(716) 849-1333
Counsel of Record

EDWARD T. HINSON, ESQ.
JAMES, McELROY & DIEHL
600 South College Street
Charlotte, NC 28202
(704) 372-9870
Of Counsel

APPENDICES

IN THE SUPREME COURT OF NORTH CAROLINA

State of North Carolina,
Plaintiff,
v
No. 202PA87-Catawba
Sharon Annette Hatfield Anderson,
Defendant.

On discretionary review pursuant to N.C.G.S. §7A-31 of a decision of the Court of Appeals, 85 N.C. App. 104, 354 S.E.2d 264 (1987), awarding the defendant a new trial upon her appeal from judgments entered 28 March 1986 by Lewis (Robert D.) J., in Superior Court, Catawba County. Heard in the Supreme Court on 10 November 1987.

LACY H. THORNBURG, Attorney General, by THOMAS J. ZIKO, Assistant Attorney General, for the State-appellant.

JAMES, McELROY & DIEHL, P.A., by EDWARD T. HINSON, JR.; LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, by PAUL J. CAMBRIA, JR., *pro hac vice*; and, HERBERT L. GREENMAN, *pro hac vice*; for the defendant-appellee.

NORTH CAROLINA CIVIL LIBERTIES UNION LEGAL FOUNDATION, by MICHAEL K. CURTIS, *amicus curiae*.

MITCHELL, Justice.

The defendant Sharon Annette Hatfield Anderson was tried upon proper indictments charging her with four offenses of feloniously disseminating obscenity in violation of N.C.G.S. §14-190.1(a)(1). The jury returned verdicts finding the defendant guilty of two of the offenses charged and not guilty of the two remaining offenses. The defendant appealed to the Court of Appeals, which entered a decision on 7 April 1987 ordering a new trial on the ground that the trial court had committed reversible

error by excluding certain expert testimony. On 7 July 1987, this Court allowed the State's petition for discretionary review.

The evidence for the State tended to show that on 7 October 1985, Steven Muhler, an investigator with the Hickory Police Department, entered the Imperial Popular Newsstand and Adult Bookstore. On that occasion, the defendant, Sharon Annette Hatfield Anderson, sold Muhler two magazines entitled *Jets of Jizz* and *Ass Masters Special #3*. On 8 October 1985, Muhler again entered the store, and the defendant sold him two magazines entitled *Super Sex Stars #1* and *Ass Masters Special #4*. The defendant was arrested on 9 October 1985 and charged with four counts of felonious dissemination of obscenity in violation of N.C.G.S. §14-190.1(a)(1).

At the conclusion of the State's case-in-chief, the defendant offered the testimony of Dr. Joseph Scott, a sociologist. Dr. Scott testified that he had been employed by the defendant to conduct a study to determine "the tolerance level in this community for adult material." He testified that he attempted to determine whether the magazines in question exceeded the level of community tolerance by examining the availability and accessibility in Catawba County of "adult material." Thereafter, the trial court excluded Dr. Scott's opinion as to whether the magazines in question "exceeded the community level of tolerance." The trial court also refused to allow him to give his opinion as to whether the materials in question "depicted or described sex in a patently offensive way, in a way not tolerated by the average adult in this community."

The defendant also offered the opinion testimony of another sociologist, Dr. Charles Winick, who had conducted a poll or survey among certain residents of Catawba County. The first question in the survey asked whether, in the opinion of those interviewed, changing standards in recent years had made the depiction of nudity and sex in materials available only to adults more or less ac-

ceptable. The next four questions were directed to whether those interviewed felt that consenting adults should have the right to obtain and view materials that depict nudity and sex. The final question asked whether those interviewed understood that the references to "nudity and sex" in the previous questions meant "exposure of the genitals and every kind of sexual activity, no matter how graphically depicted."

The trial court allowed the defendant to introduce the cumulative responses of those interviewed concerning changing standards and the definition of "nudity and sex" as used in the survey. Also, Dr. Winick was allowed to give his opinion based on the survey conducted that there was a very high degree of acceptance and toleration of sexually explicit material in Catawba County. The trial court did not allow the defendant to introduce the cumulative responses indicating the opinions of those interviewed with regard to whether consenting adults should have the right to obtain and view materials depicting nudity and sex, as the trial court concluded that those questions and answers were not relevant to any issue to be resolved at trial.

Thereafter, the defendant introduced the testimony of Dr. John T. Wheeler, another sociologist with training in the areas of family and sex therapy. Dr. Wheeler gave his opinion that the average adult applying contemporary community standards would not be stimulated in a prurient fashion by the materials at issue in the present case.

The defendant took the stand and testified on her own behalf that she was not aware of the contents of the magazines she sold Muhler and did not recall the sales for which she was charged. On cross-examination, the defendant acknowledged that she knew that the Imperial Popular Newsstand and Adult Book Store was an adult book store, and that she had sold magazines similar to those in evidence in this case on a daily basis while employed there. She testified that she was aware of a change in the obscenity

law of North Carolina which had taken effect on 1 October 1985. She also testified that, from her conversations with a police officer named Tony Keller, she had a feeling that something was "going down." She felt this to be the case because Keller had been spending a lot of time in the store and had kept telling her that she needed to get out of the store before she was arrested.

The jury returned a verdict acquitting the defendant of disseminating obscenity by the sale of the magazines *Jets of Jizz* and *Super Sex Stars #1*. The jury found the defendant guilty of disseminating obscenity by the sale of *Ass Masters Special #3* and *Ass Masters Special #4*. The trial court entered judgments sentencing the defendant to imprisonment for three years for each count, but suspended the sentences and placed the defendant on supervised probation for a period of five years. As a special condition of probation, the defendant was ordered to serve an active term of imprisonment of six months. The defendant was fined $5,000.00 for each count, as a condition of probation.

The Court of Appeals concluded that the trial court's exclusion of portions of the testimony of Dr. Winick was proper. The Court of Appeals also concluded, however, that the trial court had committed prejudicial error by the exclusion of certain proffered testimony of Dr. Scott and held that the defendant must be awarded a new trial. We reverse the holding of the Court of Appeals and remand this case for reinstatement of the judgments of the trial court.

I.

The State as appellant on discretionary review assigns error to the holding of the Court of Appeals that the trial court committed reversible error by excluding certain testimony of Dr. Scott. The State argues in support of this assignment that the trial court acted within its discretion in excluding his testimony. We agree.

Certain principles governing the admission of expert testimony in obscenity cases are well established. The prosecution is not constitutionally required to introduce expert testimony tending to show that materials alleged to be obscene are in fact obscene, once the materials have been placed in evidence. Paris Adult Theater I v. Slaton, 413 U.S. 49, 37 L.Ed. 2d 446 (1973). The materials themselves are the best evidence of what they represent. *Id.* Ordinary rules governing admission of expert testimony do not fit neatly into the trial of obscenity cases, because expert testimony usually is admitted to explain to juries what they otherwise would not understand. *Id.* "No such assistance is needed by jurors in obscenity cases." *Id.* at 56, 37 L.Ed. 2d at 456. The Supreme Court of the United States has held, however, that the defendant may introduce appropriate expert testimony during obscenity trials. Kaplan v. California, 413 U.S. 115, 121, 37 L.Ed. 2d 492, 498 (1973). Nevertheless, in obscenity trials the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." Hamling v. United States, 418 U.S. 87, 108, 41 L.Ed. 2d 590, 615 (1974).

The admissibility of expert testimony in North Carolina is now governed by Rule 702 of our Rules of Evidence. N.C.G.S. §8C-1, Rule 702 (1986). We have construed that rule to mean that: "Expert testimony is properly admissible when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences." State v. Evangelista, 319 N.C. 152, 163, 353 S.E.2d 375, 383 (1987). In applying the rule, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion. *See id.* at 164, 353 S.E.2d at 384; State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985). Further, under Rule 403 even relevant evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. State v. Mason, 315 N.C. 724, 731, 340

S.E.2d 430, 434-35 (1986). Whether to exclude expert testimony for this reason also rests within the sound discretion of the trial court, which will be reversed only for an abuse of discretion. *Id.*

Applying the foregoing standards in reviewing the trial court's exclusion of certain of Dr. Scott's testimony as tendered by the defendant, we conclude that the trial court did not abuse its discretion. Instead, the trial court acted well within its discretion in excluding the proffered expert testimony, either on the ground that it would not assist the jury in understanding the evidence or determining a fact in issue or on the ground that the defendant had failed to establish a proper basis for Dr. Scott's opinion testimony as to any fact in issue.

In determining whether the material in question in an obscenity case is obscene, the factfinder is required to apply "contemporary community standards." Miller v. California, 413 U.S. 15, 37, 37 L.Ed. 2d 419, 438 (1973). In making its determination, the trier of fact must be guided by:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed. 2d at 431. Whether material appeals to the "prurient interest" and what is "patently offensive" are questions of fact. Miller v. California, 413 U.S. at 30, 37 L.Ed. 2d at 434. As required by the decision in *Miller*, N.C.G.S. §14-190.1 specifically defines the acts of "sexual conduct" the portrayal of which may be found obscene if otherwise in violation of the statute. N.C.G.S. §14-190.1(c) (1986).

Further, subsection (b) of the statute incorporates the three part test of Miller by providing that material will be found obscene only if:

> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. §14-190.1(b) (1986). Although the statute specifically sets forth the "contemporary community standards" test only with reference to that part of the definition of obscenity relating to "prurient interests," the factfinder must be required under the statute to apply "contemporary community standards" in resolving questions concerning *both* the appeal of the material to the prurient interest *and* its patent offensiveness. *See* Smith v. United States, 431 U.S. 291, 300-301, 52 L.Ed. 2d 324, 334-35 (1977). The primary reason for applying "the standard of 'the average person, applying contemporary community standards' is to be certain that . . . [the material] will be judged by its impact on an average person. . . ." Miller v. California, 413 U.S. at 33, 37 L.Ed 2d at 436.

In the present case, Dr. Scott testified that he had been employed by the defendant to "determine what the tolerance level was in the community for adult materials." Acting according to these instructions, he conducted a study of businesses in the Ca-

tawba County area that carried "adult materials." He testified that the materials he included in his study ranged from the "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." In describing how he attempted to determine whether the sexual conduct depicted in the magazines the defendant was charged with selling exceeded the level of community tolerance, he testified:

> Well, I looked at the amount of material that was available today and certainly available for a long time. Looked at the availability of volume of the material and then I looked at the accessibility. There is a step from available to accessibility. It is like drugs are available in a community but that does not mean they are accessible. They do not have that in a store labeled as such for purchase, it is hidden.
>
> That is why I was looking for the accessibility of the adult material, in other words how open and easy it was for a wide range of people to obtain and how it was tolerated. In doing so and trying to determine the level of tolerance, I went to adult book stores, the three of them for example, to look at what they were showing, what types of movies they were showing and magazines they had for sale. I went to the video shops, your neighborhood video outlet, to determine the type of x-rated films they had to rent and the number at the time.

Thereafter, Dr. Scott was questioned by defense counsel and the trial court as follows:

> Q. Now as a result of this study, were you able to render and are you able to render an opinion whether or not the material in this case, these four magazines depict and describe sexually patently offensive conduct specifically defined by the law of North Carolina?
>
> A. Yes.

COURT: To the average person in the community.

A. Yes.

Q. What is your opinion?

A. My opinion is that it is tolerated by the average adult person in the community.

COURT: That is not the question, sir. The question is whether it is patently offensive to the average adult person in the community.

A. My answer would be that it is not patently offensive to the average person in the community.

The trial court sustained the State's objection to the proffered testimony of Dr. Scott that in his opinion the average person in the community would not find the four magazines in question to be patently offensive.

The State contends that the trial court properly excluded Dr. Scott's testimony on the ground that the defendant had failed to demonstrate that Dr. Scott had an adequate basis for forming an opinion on the issue of whether the average adult applying contemporary community standards would find the magazines in question patently offensive. On appeal, we must consider whether the proffered testimony would have assisted the jury in drawing inferences concerning that issue from facts, and whether Dr. Scott was better qualified than the jury to draw such inferences. More to the point, we must determine whether the trial court abused its discretion in determining that Dr. Scott could not assist the jury in this regard or was no better qualified than the jury drawn from Catawba County to determine whether the average adult applying contemporary community standards would find the materials in question patently offensive. State v. Evangelista, 319 N.C. at 163-64, 353 S.E.2d at 383-84; State v. Knox, 78 N.C.

App. 493, 337 S.E.2d 154 (1985); N.C.G.S. §8C-1, Rules 702 and 705 (1986).

In attempting to establish a basis for Dr. Scott's expert opinion, the defendant presented evidence that Dr. Scott had visited a variety of outlets where "adult material" could be found, including adult book stores, video shops, and convenience stores. The fact that Dr. Scott "found adult material" at several locations in Catawba County did not provide a sufficient basis to support the admission of his expert testimony concerning whether the average adult in the community would find the materials the defendant was accused of selling to be patently offensive.

The "sexual conduct" which if depicted will support a conviction under our obscenity statute is *specifically limited* by N.C.G.S. §14-190.1(c)(2) to:

> (1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or
>
> (2) Masturbation, excretory functions, or lewd exhibitions of uncovered genitals; or
>
> (3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

N.C.G.S. §14-190.1(c) (1986). The magazines that the defendant was accused of selling contain photographic depictions of actual "acts of vaginal, anal or oral intercourse" on each and every page.

Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary community standards would find magazines limited exclusively to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse" to be patently offensive. To the contrary, he indicated that the "adult magazines" he found at several locations in Catawba County cov-

ered a wide scope of materials ranging from the "extremely mild" to pictorial portrayals of mere nudity. Some unspecified number included some pictures of couples engaging in "oral, anal and vaginal sex." It is crystal clear from Dr. Scott's testimony that his study was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive material which he described as "adult material."

It is well established that:

> [T]he availability of *similar* materials on the newsstands of the community does not automatically make them admissible as tending to prove the nonobscenity of the materials which the defendant is charged with circulating. . . . 'Mere availability of *similar* material by itself means nothing more than that other persons are engaged in similar activities.'

Hamling v. United States, 418 U.S. at 125-26, 41 L.Ed. 2d at 625-26 (emphasis added) (quoting United States v. Manarite, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed. 2d 264 (1971)).

In the present case Dr. Scott's study did not even focus on the availability of material *similar* to the magazines the defendant was accused of selling. At best, his study could be said to have focused on the availability of a very broad range of sexually oriented materials that were largely dissimilar to the magazines in question, but that included some materials similar to them. Further, from his testimony it seems that he did not record the number of places where he found materials portraying actual acts of "vaginal, anal or oral intercourse" or the number of such materials he found.

Dr. Scott's study was simply too unfocused and unspecific to provide him with a sufficient basis to give an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive. His own testimony indicated that he did nothing more

than investigate the availability and accessibility of materials that were only generally sexually oriented and that he defined as "adult materials." His testimony indicated that he made no effort in his study to identify or isolate any factors bearing on the average adult's reaction to materials that were limited to pictorial portrayals of actual acts of "vaginal, anal or oral intercourse." He did not inquire of anyone's views with regard to materials limited to such portrayals and did not determine what percentage of the magazines or other materials sold or viewed in Catawba County contained such portrayals. He made no effort to determine what percentage of the population of the county viewed x-rated movies or what percentage of such movies contained depictions of actual acts of "vaginal, anal or oral intercourse." In summary, his testimony did not tend to show that he had gathered any data which would indicate whether the average adult applying contemporary community standards would find materials limited to pictorial portrayals or actual acts of "vaginal, anal or intercourse" to be patently offensive.

The trial court properly exercised its discretion by excluding Dr. Scott's expert opinion testimony concerning whether the magazines in question in this case were patently offensive to the average adult, applying contemporary community standards, on the ground that Dr. Scott was no better qualified than the jury to address the question and could not assist the jury. *See* State v. Evangelista, 319 N.C. at 163-64, 353 S.E.2d 383-84. Certainly, we cannot say that the trial court abused its discretion when it excluded the proffered testimony on this ground. Therefore, we conclude that the Court of Appeals erred in awarding a new trial due to the trial court's exclusion of this evidence.

II.

This case is before us by virtue of our having allowed the State's petition for discretionary review only on the question of the admissibility of Dr. Scott's opinion testimony. The defendant, who was the appellant in the Court of Appeals, has brought forward additional issues that she properly presented for review by the Court of Appeals. Those issues, therefore, are properly before us. App. R. 16.

The defendant first assigns as error the trial court's exclusion of certain evidence during the testimony of the defendant's expert witness Dr. Charles Winick. The Court of Appeals concluded that "the trial court's treatment of Dr. Winick's testimony was appropriate. . ." State v. Anderson, 85 N.C. App. 104, 106, 354, S.E.2d 264, 265 (1987). We agree.

At trial the defendant attempted to introduce the expert opinion testimony of Dr. Winick, a sociologist, concerning a survey or poll he conducted of certain residents of Catawba County. The questions asked and the responses to them include the following:

> Q:2. In your opinion, have standards changed in recent years, so that depiction of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications and other material depicting nudity and sex and available only to adults, but not to children? More acceptable - 76%; less acceptable - 24%; Neither/DK
>
> Q:3. Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? Agree - 80%; Disagree - 17%; Neither/DK - 3%
>
> Q:4. Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and

sex are available only to adults, but not to children? Agree - 65%; Disagree - 31%; Neither/DK

Q:5. Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to aduits, but not to children? Agree - 75%; Disagree - 25%; Neither/DK

Q:6. Do you think it is alright or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex which are available only to adults and not to children? All right - 79%; Not all right - 21%; Neither/DK

Q:7. We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else? Understood - 90%; Something else - 10%

The trial court permitted the defendant to introduce the cumulative responses to survey question "Q:2" regarding changing standards and the responses to survey question "Q:7" concerning the manner of use of the phrase "nudity and sex." The trial court also permitted Dr. Winick to testify that in his opinion the survey demonstrated a "very high degree of acceptance and toleration of sexually explicit material" in Catawba County, and that he was using the phrase "sexually explicit material" as meaning materials similar to the magazines in question.

The trial court did not permit the defendant to introduce the cumulative responses to any of the other survey questions, however, which pertained to the views of those interviewed as to when, where, and how — if at all — adults should be able to obtain and view materials portraying nudity and sex. The trial court excluded this evidence for lack of relevance after concluding that the

questions did not address the offensiveness of any material to the average person but, instead, related to "whether those interviewed wished to impose their beliefs or views on others."

We conclude that the trial court properly excluded the cumulative results of the survey with regard to questions 3, 4, 5, and 6. Those questions amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. §14-190.1. The issue the jury was to decide, however, was whether the average adult, applying contemporary community standards, would find that the magazines in question appealed to a prurient interest in sex in a patently offensive manner. The trial court did not abuse its discretion when it determined that the cumulative results of the responses to questions 3, 4, 5, and 6 would not assist the jury in resolving the issue before it and excluded those questions and results. *See* State v. Evangelista, 319 N.C. at 164, 353 S.E.2d at 384; State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154; N.C.G.S. §8C-1, Rule 702 (1986).

Additionally, it is clear from the transcript of the trial that the trial court was of the view that any probative value such evidence might have substantially outweighed by the danger of confusion of the issues or danger of misleading the jury. It was within the discretion of the trial court to exclude the proffered testimony on that basis. State v. Mason, 315 N.C. at 731, 340 S.E.2d at 434-35; N.C.G.S. §8C-1, Rule 403 (1986). The trial court did not err in excluding the evidence in questions, and this assignment of error is overruled.

III.

By her next assignment of error, the defendant contends that various portions of the jury arguments for the State amounted to prosecutorial misconduct so flagrant that the trial court committed reversible error in denying her resulting motion for a mistrial.

The defendant first contends that it was reversible error for one of the prosecutors to argue to the jury:

> Let me talk to you about this. If anything could be obscene, if anything could be obscene and these items which you, you have seen are not obscene, I don't know what it would take to be.

The defendant contends that this argument amounted to an expression of the prosecutor's personal belief in violation of N.C.G.S. §15A-1230(a). Strictly speaking, the argument was not an expression of an opinion but, instead, a statement that the prosecutor would be unable to form an opinion as to what was obscene if the material before the jury was not. At most it amounted to a rhetorical statement implying that the State's evidence was overwhelming and contending that the jury should find the magazines in question obscene.

We have frequently held that counsel must be allowed wide latitude in jury arguments in hotly contested cases. *E.g.*, State v. Covington, 317 N.C. 127, 343 S.E.2d 524 (1986); State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985). Counsel may argue the facts in evidence and all reasonable inferences that may be drawn therefrom together with the relevant law in presenting the case. State v. Covington, 317 N.C. 127, 343 S.E.2d 524. Whether counsel has abused this right is a matter ordinarily left to the sound discretion of the trial court. *Id.* Counsel may not, however, place before the jury incompetent and prejudicial matter by expressing personal knowledge, beliefs, and opinions not supported by evidence. *Id.* Upon objection, the trial court has the duty to censor remarks not warranted by the evidence or law and may, in cases of gross impropriety, properly intervene *ex mero motu*. *Id.* Applying these principles, we conclude that the previously quoted argument was within the latitude that may be allowed counsel in stating contentions and drawing inferences from the evidence. The trial court did not err in overruling the defendant's objection.

The defendant next contends that the trial court erred by overruling her objection to the argument of one of the prosecutors that:

> I contend to you that it is obviously obscene, clearly obscene and patently offensive. Picture after picture of anal intercourse. What is more unhealthy than anal intercourse? How could it be anything but obscene?

This argument also was within the latitude allowed counsel in stating contentions and arguing reasonable inferences to be drawn from the evidence. The trial court did not err in overruling the defendant's objection to this portion of the argument.

The defendant next contends that the prosecutors made numerous misstatements of law in their closing arguments for the State and made statements that led the jury to make improper inferences of law. We have reviewed each of the portions of the arguments to which the defendant has taken exception in this regard. Even if it is assumed *arguendo* that the arguments included misstatements of law or statements that might have tended to mislead the jury as to the applicable law, we detect no prejudice to the defendant.

At the outset of the State's closing arguments to the jury, one of the prosecutors immediately emphasized to the jury:

> Now, this case is, of course, one involving perhaps more of an unusual law and the attorneys, all of us will be arguing the law to you. I want to remind you that what I say to you now and what [other counsel]. . . all say to you first is not evidence and it is not the final word on the law. His Honor is the final word on the law and you should listen very carefully to his charge and apply the law which is your duty as jurors.

At the conclusion of the arguments of counsel, the trial court gave proper instructions on the applicable law. We conclude that those instructions, in the context of this case, cured any prejudice to the defendant which may have resulted from the possible misstate-

ments of law in the prosecutors' arguments to which the defendant has excepted. *See* State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, *cert. denied*, ____U.S.____, 93 L.Ed. 2d 166 (1986); State v. Harris, 290 N.C. 681, 228 S.E.2d 437 (1976).

The defendant next contends that the prosecutors "traveled outside the record in their arguments to the jury." She first complains that the prosecutors improperly attacked the credibility of her expert witness, Dr. Scott. At trial Dr. Scott had testified that he found a wide range of materials, including materials depicting vaginal, oral and anal intercourse, in a wide variety of locations, which included the convenience stores marked on a map he used to illustrate his testimony. To rebut this testimony, the State introduced the testimony of Mr. Jack Shulter, Division Manager for Quick Stop Convenient Stores. Shulter testified that Quick Stop operated convenience stores at some of the locations marked in orange on Dr. Scott's map. Shulter further testified that those stores did not carry the magazines the defendant was accused of selling or any similar materials.

During the State's closing arguments, one of the prosecutors argued:

> What did Mr. Shulter, who was the district manager of the biggest stores in this county or chain in this county tell you? He tells you that you can't find anal intercourse material at these places that Dr. Scott has marked here in orange. He says that it is preposterous.

The trial court sustained the defendant's objection to this portion of the arguments and ordered it stricken. The prosecutor then argued:

> It is your job as a jury to decide what is believable and what is not believable and I argue to you from testimony that you have heard from Mr. Shulter that everything that Mr. Scott testified to is unbelievable.

The trial court overruled the defendant's objection to this argument.

In arguing to the jury, the State may comment on any contradictory evidence as a basis for the jury's disbelief of a witness's testimony. State v. Williams, 314 N.C. 337, 333 S.E.2d 708 (1985). Here, the argument allowed by the trial court was based upon Shulter's testimony and was a proper contention that, based on that testimony, the jury should disbelieve Dr. Scott. The trial court did not err in overruling the objection.

The defendant also contends that the prosecutors went outside the record to express personal opinions at several other points during their arguments to the jury on behalf of the State. On each of the occasions complained of, however, the trial court sustained the defendant's objections, admonished the prosecutors, and expressly instructed the jury to disregard the argument in question. The record does not reflect that the prosecutors on any of these occasions attempted to circumvent the ruling of the trial court or return to the improper arguments. Given this situation, the trial court's prompt curative instructions were sufficient to remove any possible prejudice that may have resulted from the remarks of the prosecutors. State v. Bruce, 315 N.C. 273, 337 S.E.2d 510 (1985). This conclusion draws some additional support from the fact that the jury acquitted the defendant on two counts.

For the foregoing reasons, we conclude that the trial court did not err in denying the defendant's motion for a mistrial based upon alleged prosecutorial misconduct. This assignment of error is overruled.

IV.

The defendant next argues that N.C.G.S. §14-190.1 is facially unconstitutional under the Constitution of North Carolina. In support of this contention, the defendant argues that the statute

incorporates the *Miller* test for obscenity adopted by the Supreme Court of the United States. The defendant argues that the *Miller* test is "unworkable and unfair in the criminal context" and urges us to hold that our statute incorporating it is facially violative of the Constitution of North Carolina. We have recently rejected similar arguments and do so again here. Cinema I Video v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987).

The defendant next argues that the statute is facially invalid under article I, sections 14 and 19 of the Constitution of North Carolina, because it fails to "provide guidance or uniformity in selection of the community by whose standards a defendant's conduct is to be judged." The defendant argues that the statute is fatally flawed in this regard because it does not specify that obscenity is to be judged in accordance with national or statewide "community standards" or otherwise specify the geographic area intended by the use of the term "community standards." When the same argument has been based upon the Constitution of the United States, it has been rejected. Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed. 2d 642 (1974). We are constrained to conclude that this argument is equally untenable when based upon the Constitution of North Carolina. *See* State v. Bryant and Floyd, 285 N.C. 27, 203 S.E.2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed. 2d 188 (1974). As presently constituted, N.C.G.S. §14-190.1 is not facially violative of the Constitution of North Carolina. Cinema I Video v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383.

V.

The defendant next contends that the statute was unconstitutionally applied in the present case. In support of this contention, the defendant first renews her argument that the statute was rendered fatally defective because the jury was given no guidance as

to "which community's standards" it was to apply in assessing the defendant's guilt. For reasons we have previously discussed in addressing the defendant's contentions as to facial unconstitutionality of the statute, we reject this contention as being without merit.

The defendant next contends that the statute was applied in the present case in an unconstitutional manner, because the trial court's instructions permitted the jury to find the defendant guilty without finding that she knew the contents of the magazines she sold. She argues that, as a result, the jury was not required to find that she possessed the requisite intent and guilty knowledge to support a conviction. The trial court specifically instructed the jury in the present case that to satisfy the intent requirement of the statute, the State must prove that the defendant knew the content, character, and nature of the magazines when she sold them. The statute was constitutionally applied in this regard by the trial court, and the defendant's contention to the contrary is without merit.

Finally, the defendant contends that the statute was applied in violation of the First Amendment in the present case, because the jury was not directed to apply the "reasonable person standard" when determining whether the magazines in question, taken as a whole, lacked serious literary, artistic, political or scientific value. Unlike appeal to the prurient interest and patent offensiveness, the value of material alleged to be obscene may not be judged by contemporary community standards. *See* Smith v. United States, 431 U.S. at 301, 52 L.Ed. 2d at 335. Instead, the literary, artistic, political, or scientific value of material is to be determined based upon whether a "reasonable person" would find such value in the material, taken as whole. Pope v. Illinois, 481 U.S.____, 95 L.Ed. 2d 439 (1987). However, the Supreme Court of the United States has indicated that the decision in a particular case as to whether to instruct the jury to apply the reasonable person test in this regard is a matter in the discretion of the trial court. *Id.* at ____n.3, 95

L.Ed. 2d at 445 n.3. In the present case, unlike the situation in *Pope*, the trial court did not erroneously instruct the jury that they should apply contemporary community standards in determining the value of the materials in question. Instead, the trial court merely failed to instruct the jury that it must apply a reasonable person standard. We conclude that this did not amount to prejudicial error. *Id.*

For the foregoing reasons, we conclude that the defendant received a fair trial free of prejudicial error. Accordingly, we reverse the holding of the Court of Appeals, which awarded the defendant a new trial, and remand this case for reinstatement of the judgments of the trial court.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA

v.

SHARON ANNETTE HATFIELD ANDERSON.

No. 8625SC792.

Court of Appeals of North Carolina.

April 7, 1987.

Defendant was charged in proper bills of indictment with four (4) counts of disseminating obscenity in violation of G.S. 14-190.1(a)(1).

On 7 October 1985 Investigator Mulher of the Hickory Police Department entered the Imperial Newsstand and purchased two magazines entitled *Jets of Jizz* and *Ass Masters, Special # 3* from the defendant. On 8 October 1985 he again entered the Imperial Newsstand and purchased two magazines entitled *Super Sex Stars # 1* and *Ass Masters, Special # 4* from the defendant. On 9 October 1985 the defendant was arrested and charged with four counts of disseminating obscenity in the sale of the magazines.

The jury returned a verdict acquitting defendant of disseminating obscenity in the sale of the magazines entitled *Jets of Jizz* and *Super Sex Stars # 1*. The jury convicted defendant of disseminating obscenity in the sale of the magazines entitled *Ass Masters, Special # 3* and *Special # 4*.

The trial court entered judgments sentencing defendant to three years imprisonment on each count. Execution of the sentences was suspended and defendant was placed on supervised probation for five years. As a special condition of probation defendant was ordered to serve an active prison term of six months in the custody of the Department of Corrections as a committed youthful offender. As a regular condition of probation, defendant was fined $5,000.00 for each count. Defendant appeals.

Atty. Gen. Lacy H. Thornburg by Asst. Atty. Gen. Thomas J. Ziko, Raleigh, for the State.

Lipsitz, Green, Fahringer, Roll, Schuller & James by Paul J. Cambria, Jr., Herbert L. Greenman and Cherie L. Peterson, Buffalo, N.Y. and James, McElroy & Diehl by Edward T. Hinson, Jr., Charlotte, for defendant-appellant.

EAGLES, Judge.

At trial defendant presented two expert witnesses, Dr. Charles Winick and Dr. Joseph Scott, to assist the jury in determining "contemporary community standards" relating to publications containing the depiction or description of sexual matters. The trial court excluded from evidence the results of a public opinion poll conducted by Dr. Winick on the issue of community standards. The trial court also refused to allow Dr. Scott to give his opinion about whether or not [the] four magazines exceeded the community level of tolerance and whether the magazines "depicted or described sex in a patently offensive way, a way not tolerated by the average adult in the community." Defendant contends that these rulings constitute an abuse of discretion and reversible error. We conclude that the trial court's treatment of Dr. Winick's testimony was appropriate; however, we agree with defendant that the exclusion of Dr. Scott's expert testimony was reversible error and requires a new trial.

In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) the Supreme Court held that obscenity is to be determined by applying "contemporary community standards." *Id.* at 37, 93 S.Ct. at 2622, 37 L.Ed.2d at 438. As explained by the court, the basic guidelines for the trier of fact must be:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently of-

> fensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 93 S.Ct. st 2615, 37 L.Ed.2d at 431. Precisely what appeals to the "prurient interest" and what is "patently offensive" are questions of fact. *Id.* at 30, 93 S.Ct. at 2618, 37 L.Ed.2d at 434.

The definition of obscenity in G.S. 14-190.1 codifies the *Miller* three-part test. G.S. 14-190.1(b) requires three factual findings before material can be defined as obscene. First, the jury must find that the material depicts "sexual conduct" in a patently offensive way. This requires a two-part inquiry: (1) does the material in question contain descriptions or depictions of sexual conduct defined in G.S. 14-190.1(c), and if so, then (2) is the sexual conduct depicted or described in a "patently offensive way?" Second, the jury must find that the average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex. Third, the jury must find that the material lacks serious literary, artistic, political or scientific value. G.S. 14-190.1(b)(1)-(3).

[1] While G.S. 14-190.1(b) includes "contemporary community standards" only with reference to the "prurient interest" part of the statutory definition of obscenity, the Supreme Court has made it clear that under the *Miller* test "contemporary community standards" provide the measure against which juries decide both the questions of appeal to the prurient interest *and* patent offensiveness. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). The principal concern in requiring judgment to be made on the basis of contemporary community standards is to assure that the challenged material is not judged on the basis of each juror's own personal opinion or judged by its effect on a particularly sensitive or insensitive individual or

group. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). As explained by the Court in *Miller* "the primary concern with requiring a jury to apply the standard of 'the average person applying contemporary community standards' is to be certain that . . . [the material] will be judged by its impact on an average person." 413 U.S. at 33, 93 S.Ct. at 2620, 37 L.Ed.2d at 436.

The Supreme Court has held that there is no constitutional need for expert testimony that the materials are obscene once the materials have been placed in evidence. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973). The materials themselves are the best evidence of what they represent. *Id.* The subject of obscenity does not lend itself to the traditional use of expert testimony because expert testimony is usually admitted to explain to juries what they otherwise would not understand. *Id.* "No such assistance is needed by jurors in obscenity cases." *Id.* at 56, 93 S.Ct. at 2634, 37 L.Ed.2d at 456. However, in *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973), the court, citing Justice Frankfurter's concurring opinion in *Smith v. California*, 361 U.S. 147, 160, 80 S.Ct. 215, 222, 4 L.Ed.2d 205, 215 (1959), pointed out that the *defense* is free to introduce appropriate expert testimony in obscenity litigation. 413 U.S. at 121, 93 S.Ct. at 2685, 37 L.Ed.2d at 498. As explained by Justice Frankfurter:

> [It is] the right of one charged with obscenity — a right implicit in the very nature of the legal concept of obscenity — to enlighten the judgment of the tribunal, be it the jury or . . . the judge, regarding the prevailing literary and moral community standards and to do so through qualified experts.
>
> There is no external measuring rod for obscenity. Neither, on the other hand, is its ascertainment a merely subjective reflection of the taste or moral outlook of individual jurors or individual judges. Since the law through its functionaries is "applying contemporary community standards" in deter-

> mining what constitutes obscenity, . . . it surely must be deemed rational, and therefore relevant to the issue of obscenity, to allow light to be shed on what those "contemporary community standards" are. Their interpretation ought not to depend solely on the necessarily limited, hit-or-miss, subjective view of what they are believed to be by the individual juror or judge.

361 U.S. at 164-165, 80 S.Ct. at 225, 4 L.Ed.2d at 218 (Frankfurter, J., concurring).

[2] While it is established that expert testimony is admissible in obscenity trials, the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling v. United States, supra* 418 U.S. at 108, 94 S.Ct. at 2903, 41 L.Ed.2d at 615. Once the expert witness demonstrates "knowledge, skill, experience, training or education" as required by Rule 702 of the Rules of Evidence, the test of admissibility is "helpfulness." H. Brandis, *North Carolina Evidence* Section 132 (Cumm. Supp. 1986). As explained by this court in *State v. Knox*, 78 N.C.App. 493, 337 S.E.2d 154 (1985), "[t]he test for admissibility is whether the jury can receive 'appreciable help' from the expert witness." *Id.* at 495, 337 S.E.2d at 156. "Applying this rest requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay." *Id.*

Prior to trial, defendant employed Dr. Joseph Scott to conduct an ethnological study to determine "the level of tolerance for adult material" in Catawba County. Dr. Scott, a sociologist with a background in statistical methodology, testified that ethnology looks at "what is going on in the community" and specifically "in this area with regard to adult material, what is available, what are the behavior patterns, how do they reflect the tolerance in the community or the level of the tolerance of the adult material in the community by the adults in the community." Dr. Scott testified

that this type of study is an accepted procedure of sociology to measure the community's level of tolerance for adult material.

In performing his ethnological study, Dr. Scott visited 38 locations in Catawba County where adult magazines were sold. Dr. Scott defined "adult magazines" as ranging from the "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." He viewed the adult magazines displayed at these locations and talked with store clerks to obtain opinions about these magazines as expressed by purchasing and nonpurchasing patrons. After visiting these 38 locations Dr. Scott then met with the general manager of the major distributor of magazines in the area to determine the total number of magazine outlets in the county and the percentage of the magazine outlets that sell adult material. He conducted a comparative study to determine adult magazine circulation in Catawba County as compared to North Carolina and the United States as a whole. Dr. Scott visited 12 video tape rental (and sales) outlets to determine the availability of and demand for adult video tapes, the type of people who rent them and the percentage of video rentals comprised of adult movies. There too he interviewed outlet staff personnel. Dr. Scott also visited three adult book stores in Catawba County and talked with customers and clerks there. He visited the local cable television company to determine the number of subscribers to the adult movie channel. He visited local bars which featured topless dancers. He spoke with the local newspaper editor and the person in charge of the newspaper's editorial section. He read every letter to the editor for local newspapers on the subject from 1 January 1985 through October 1985. He testified that his objective was to determine "what was going on" in the community.

[3] Dr. Scott testified that he received a copy of each of the four magazines that defendant sold to Officer Mulher. He explained

that based on his ethnological study and his examination of the four magazines, he formed an opinion as to whether or not the sexual conduct depicted in the four magazines "exceeded the community level of tolerance" for sexual conduct in Catawba County. However, following an objection by the State, Dr. Scott was not permitted to state his opinion. On *voir dire* Dr. Scott was questioned by defense counsel and the court as follows:

> Q. [defense counsel] Now as a result of this [study], were you able to render and are you able to render an opinion whether or not the material in this case, these four magazines, depict and describe sexually patently offensive conduct specifically defined by the law of North Carolina?
>
> A. Yes.
>
> COURT: To the average person in the community.
>
> Q. To the average adult person in the community.
>
> A. Yes.
>
> Q. What is your opinion?
>
> A. My opinion is that it is tolerated by the average adult person in the community.
>
> COURT: That is not the question, sir. The question is whether it is patently offensive to the average adult person in the community.
>
> A. My answer would be that it is not patently offensive to the average person in the community.

The trial court sustained the State's objection to Dr. Scott's testimony that in his opinion the average person in Catawba County would not find the four subject magazines to be patently offensive. Defendant contends that it was error to exclude this opinion testimony. We agree.

[4] We emphasize what the Supreme Court has already made clear, i.e., "contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case." *Smith v. United States, supra*, 431 U.S. at 300, 97 S.Ct. at 1763, 52 L.Ed.2d at 334. The underlying questions of fact are whether the material appeals to a prurient interest interest in sex and is patently offensive. *Id.* at 300-01, 97 S.Ct. at 1763-64, 52 L.Ed.2d at 334-335. Accordingly, in order for a study like Dr. Scott's ethnological study to be relevant, i.e. appreciably helpful to the jury, the study must be related to the underlying factual questions that the jury is being asked to decide.

The transcript of Dr. Scott's testimony indicates that in Dr. Scott's expert opinion contemporary community standards are revealed by what type of activity adults in the community will "tolerate." As Dr. Scott explained, he came to Catawba County at defendant's request to "look at the community and determine what the tolerance level was in this community for adult material." He also explained that he used the ethnological study method in order to determine how community behavior patterns reflect the level of the tolerance of the adult material in the community." The trial court expressed concern about this use of the word, "tolerance." It appears, from the trial transcript, that defendant's reliance on this standard of what the community will "tolerate" comes from the following language in *Smith v. United States, supra*:

> Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of

> a callous minority. See *Miller v. California*, 413 U.S. at 30, 93 S.Ct. at 2618, 37 L.Ed.2d at 434.

431 U.S. at 305, 97 S.Ct at 1766, 52 L.Ed.2d at 338. However, the Court in *Smith* was trying to explain its position in *Miller v. California, supra*, that the primary logic behind requiring juries to apply "contemporary community standards" is to insure that the material under scrutiny is judged by its *impact* on an average person rather than a particularly sensitive or insensitive one. 413 U.S. at 33, 93 S.Ct. at 2620, 37 L.Ed.2d at 436. Reading *Miller* and the above-quoted portion of *Smith* together, the concern is with the material's impact as measured by its effect on the average person in the community. "Tolerance" in this sense means the ability of the average person in the community to endure the impact or effect of this type of material and not whether the average person in the community "tolerate" widespread availability and the permissive attitudes of others.

[5] Though the State contends otherwise, it is not clear that Dr. Scott's study is entirely based on the impermissible definition of "tolerance." The best way for Dr. Scott to determine the impact of these four magazines on the average person in the community is to go throughout the community showing these magazines to various randomly selected adult community residents. However, as defendants point out and the State agrees, if the magazines are in fact obscene, Dr. Scott is not permitted by law to disseminate them by showing them to randomly selected residents. What he did then was one of the next best things. While some of his methods could be said to demonstrate mere availability, accessibility and generally permissive attitudes, we do not believe that the study is so entirely flawed as to render his opinion on patent offensiveness wholly irrelevant and inadmissible. G.S. 8C-1, Rule 702 of our Rules of Evidence provides that if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto

in the form of an opinion." The test for admissibility is whether the jury can receive appreciable help from the expert witness. *State v. Knox, supra*. We are required to balance the probative value of the testimony against its potential for prejudice, confusion or undue delay.

It is clear from the record that as a result of his study Dr. Scott acquired specialized knowledge of contemporary community standards with respect to what he defined as "adult materials." However, the Supreme Court has said that contemporary community standards take on meaning only when they are applied to the factual questions before the jury, i.e. appeal to prurient interest and patent offensiveness. Therefore, if Dr. Scott, based on his specialized knowledge of contemporary community standards, formed an opinion about whether the challenged materials would be patently offensive to the average person in the community, then we can see no reason, based on a relevancy objection, to prevent the jury from having the benefit of that opinion testimony. Without Dr. Scott's opinion testimony the only evidence defendant was allowed to present to the jury on contemporary community standards were Dr. Winick's two survey questions which informed the jury only that 76% of the people interviewed believed that in recent years standards have changed and the depiction of nudity and sex is more acceptable in movies, video cassettes, publications and other material available to adults but not children.

[6] We believe that the probative value of Dr. Scott's opinion testimony outweighs any potential for prejudice, confusion or undue delay. In reaching this decision, we have been attentive to the Supreme Court's observation in *Kaplan v. California* that the defense is free to introduce appropriate expert testimony on the obscenity question, 413 U.S. at 121, 93 S.Ct. at 2685, 37 L.Ed.2d at 498. We are similarly advertent to the language in Justice Frankfurter's concurring opinion in *Smith v. California* that "it surely must be deemed rational, and therefore relevant to the issue of

obscenity, to allow light to be shed on what those 'contemporary community standards' are." 361 U.S. at 165, 80 S.Ct. at 225, 4 L.Ed.2d at 218. Here, the trial court erred in sustaining the State's objection to Dr. Scott's opinion testimony as to the patent offensiveness of these magazines. We cannot say that the effect was not prejudicial here since this was defendant's only relevant evidence of contemporary community standards. Defendant is therefore entitled to a new trial.

New trial.

WELLS and GREENE, JJ., concur.

DR. WINICK'S CATAWBA COUNTY SURVEY QUESTIONS AND RESULTS EXCLUDED BY THE TRIAL COURT IN *STATE v. ANDERSON*

Q:2. In your opinion, have standards changed in recent years, so that depiction of nudity and sex are more acceptable in movies, video cassettes, publications and other material depicting nudity and sex and available only to adults, but not to children? More acceptable - 76%; less acceptable - 24%; Neither/DK

Q:3. Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? Agree - 80%; Disagree - 17%; Neither/DK - 3%

Q:4. Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex are available only to adults, but not to children? Agree - 65%; Disagree - 31%; Neither/DK - 4%

Q:5. Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children? Agree - 75%; Disagree - 25%; Neither/DK

Q:6. Do you think it is alright [sic] or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex which are available only to adults and not to children? Alright - 79%; Not Alright - 21%; Neither/DK

Q:7. We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think that we meant something else? Understood - 90%; Something else - 10%

DR. BELL'S ILLINOIS SURVEY QUESTIONS AND RESULTS (RULED ADMISSIBLE IN *PEOPLE V. NELSON*, 88 Ill.App.3d 196, 410 N.E.2d 476 [1980])

Q: Is it your opinion that in recent years the standards in Illinois have changed so that depictions of nudity and sexual activities in movies and publications available only to adults are now more acceptable or less acceptable?

More acceptable, 60.5%; less acceptable, 25.7%; neither, 7.8%; don't know, 4.4%; no answer, 1.3%, other, .2%.

Q: Do you think it is acceptable or not acceptable in Illinois for the average adult to see any depiction of actual or pretended sexual activities shown in movies and publications that he or she wants to?

Acceptable, 58.1%; not acceptable, 33.2%; neither, 5.2%; no answer, 3.5%.

Q: Adults who want to view them, to purchase magazines that depict nudity and actual or pretended sexual activities?

Alright, 63.1%; not alright, 31.0%; neither, 2.2%; no answer, 3.6%.

Q: Movie theaters, restricting attendance to adults only, to show films that depict nudity and actual or pretended sexual activities for adults who want to attend?

Alright - 59.2%; not alright, 32.1%, neither, 4.3%; no answer, 4.4%.

Q: Bookstores that restrict admittance to adults only to sell publications and movies depicting nudity and actual or pretended sexual activities for adults who want to go inside them?

Alright, 54.8%; not alright, 37.3%; neither, 4.0%; no answer, 3.9%.

Q: Arcades that restrict admittance to adults only to show films that depict nudity and actual or pretended sexual activities?

Alright, 48.7%; not alright, 42.1%; neither, 3.5%; no answer, 5.7%.

Q: Adults who want to, in the privacy of their homes, to see movies and publications that depict nudity and actual or pretended sexual activities?

Alright, 67.4%; not alright, 25.7%; neither, 2.9%; no answer, 4.0%.

Q: We have used the phrases "nudity" and "sexual activities" in the interview. What we mean by these terms is total male and/or female nudity, and sexual intercourse including all kinds of sexual variations. Is that what you understood we meant, or did you think we meant something else?

Understood, 93.4; something else, 3.0%; neither, 1.8%; no answer, 1.8%.

INDIANA SURVEY QUESTIONS (RULED ADMISSIBLE IN *SALIBA v. STATE*, 475 N.E.2d 1181 [Ind.App. 1985])

Q: In your opinion, have standards in Indiana changed in recent years so that depictions of nudity and sexual activities in movies and publications available only to adults are now more acceptable or less acceptable, or haven't they changed much?

Q: Do you personally think it is acceptable or not acceptable for the average adult to see any depiction of actual or pretended sexual activities shown in movies and publications that he or she wants to?

Q: In your opinion, is it now alright or not alright in the State of Indiana for adults who want to view them, to purchase magazines that show nudity and actual or pretended sexual activities?

Q: In your opinion, is it now alright or not alright in the State of Indiana for movie theaters, restricting attendance to adults only, to show films that depict nudity and actual or pretended sexual activities for adults who want to attend?

Q: In your opinion, is it now alright or not alright in the State of Indiana for bookstores that restrict admittance to adults to sell publications and movies depicting nudity and actual or pretended sexual activities for adults who want to go inside and buy them?

Q: In your opinion, is it now alright or not alright in the State of Indiana for arcades that restrict admittance to adults only to show films that depict nudity and actual or pretended sexual activities?

Q: In your opinion, is it now alright or not alright in the State of Indiana for adults who want to, in the privacy of their homes, to see movies and publications that depict nudity and actual or pretended sexual activities?

Q: Finally, we have used the phrases "nudity" and "sexual activities" in the interview. What we mean by these terms is total male and/or female nudity, and sexual intercourse including all kinds of sexual variation. Is that what you understood we meant, or did you think we meant something else?

87-2030

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

LACY H. THORNBURG
Attorney General of
North Carolina

Edwin M. Speas, Jr.
Special Deputy Attorney General

Thomas J. Ziko
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-7387

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. THE SUPREME COURT OF NORTH CAROLINA'S DECISION FINDING NO PREJUDICIAL ERROR IN THE TRIAL COURT'S INSTRUCTIONS REGARDING THE VALUE PRONG OF THE OBSCENITY TEST IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *POPE V. ILLINOIS*, 481 U.S. ___, 107 S. Ct. 1918 (1987). 3

II. THE ALLEGED ERRORS IN THE TRIAL COURT'S DECISIONS REGARDING THE ADMISSION OF EVIDENCE AND PROSECUTOR'S ARGUMENTS DID NOT VIOLATE THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL. 4

III. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED THE TESTIMONY OF DR. SCOTT IS CONSISTENT WITH THIS COURT'S OPINIONS REGARDING THE ADMISSION OF EXPERT TESTIMONY IN OBSCENITY CASES AND THE RULES OF EVIDENCE. . . 5

IV. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED PORTIONS OF DR. WINNICK'S TESTIMONY IS CONSISTENT WITH THIS COURT'S OPINIONS AND THE RULES OF EVIDENCE. 10

V. THE SUPREME COURT OF NORTH CAROLINA PROPERLY REFUSED TO REVERSE THE PETITIONER'S CONVICTION ON GROUNDS OF PROSECUTORIAL MISCONDUCT. 12

CONCLUSION 15

CERTIFICATE OF SERVICE 16

TABLE OF AUTHORITIES

PAGE

Berger v. United States, 295 U.S. 78 (1975) 12

Burgett v. Texas, 389 U.S. 109 (1967) 5

Cinema I Video v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987) 11

Darden v. Wainwright, 477 U.S. 168 (1986) 13

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 5

Donnelly v. De Christoforo, 416 U.S. 637 (1974) 5, 13

Hamling v. United States, 418 U.S. 87 (1974) 8, 9

Kaplan v. California, 413 U.S. 115 (1973) 7

Lisenba v. California, 314 U.S. 219 (1941) 5

Miller v. California, 413 U.S. 15 (1972) 7, 11

Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) 9, 11

Pope v. Illinois, 481 U.S. ___, 107 S. Ct. 1918 (1987) ... 3, 4

Smith v. California, 361 U.S. 147 (1959) 7

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 4

Fed. R. Evid. 403 ..... 8, 12

Fed. R. Evid. 702 ..... 8, 12

Fed. R. Evid. 70 8

N.C.G.S. § 8C-1, Rule 403 (1986) 8, 12

N.C.G.S. § 8C-1, Rule 702 (1986) 8

N.C.G.S. § 8C-1, Rule 703 (1986) 9

N.C.G.S. § 14-190.1 (1985) 1, 6, 12

N.C.G.S. § 14-190.1(a)(1) (1985) 2

28 U.S.C. § 1257(3) 4, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

SHARON ANNETTE HATFIELD ANDERSON

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE CASE

In this case the Petitioner, Ms. Sharon Anderson, was convicted on two counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1 (1985). The evidence for the state tended to show that on 7 October 1985 an investigator with the Hickory Police Department entered the Imperial Popular Newsstand and Adult Bookstore. On that occasion Ms. Anderson sold the investigator two magazines entitled "Jets of Jizz" and "Ass Masters Special 3". On 8 October 1985 the investigator returned to the store. On that occasion Ms. Anderson sold him two magazines entitled "Super Sex Stars 1" and "Ass Masters Special 4". The Petitioner was subsequently arrested and charged with four counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1(a)(1) (1985). Appendix to Petition (herinafter "A.P.") p. A-2.

During the State's case-in-chief the prosecution presented the testimony of the investigating officer who purchased the magazines from Ms. Anderson and also entered into evidence the four magazines which provided the basis for the charges. A.P., p. A-2.

During her case-in-chief, Ms. Anderson attempted to introduce the opinion testimony of two alleged experts, Dr. Joseph Scott and Dr. Charles Winnick. The trial court excluded portions of these witnesses' testimony. Ms. Anderson also took the stand to testify in her own defense. On direct examination she testified that she was not aware of the contents of the magazines in question when she sold them to the investigating officer and did not recall the sales for which she was charged. On cross examination, however, Ms. Anderson admitted that she knew that the Imperial Popular Newsstand and Adult Bookstore was an adult bookstore, that she had sold magazines similar to those in issue on a daily basis while employed at the bookstore, that she was aware of the change in the obscenity law of North Carolina which had taken effect on 1 October 1985, that from her conversations with a police officer she had a feeling that something "was going down," and that a police officer had kept telling her that she needed to get out of the store before she was arrested. A.P., pp. A-3 to A-4.

The jury returned a verdict acquitting Ms. Anderson on the charges arising out of the sale of the magazines "Jets of Jizz" and "Super Sex Stars 1". The jury, however, found Ms. Anderson guilty of disseminating obscenity in violation of N.C.G.S. § 14-190.1(a)(1) (1985) for selling the magazines entitled "Ass Masters Special 3" and "Ass Masters Special 4".

REASONS FOR DENYING THE WRIT

I. THE SUPREME COURT OF NORTH CAROLINA'S DECISION FINDING NO PREJUDICIAL ERROR IN THE TRIAL COURT'S INSTRUCTIONS REGARDING THE VALUE PRONG OF THE OBSCENITY TEST IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN *POPE V. ILLINOIS*, 481 U.S. ___, 107 S. Ct. 1918 (1987).

In its charge the trial court properly instructed the jury to apply "contemporary community standards" when determining whether the material at issue was patently offensive or appealed to a prurient interest in sex. The trial court, however, did not instruct the jury to utilize "contemporary community standards" when determining whether the material at issue lacked serious literary, artistic, political or social value. Instead, the trial court simply instructed the jury:

> "The third essential element of obscenity, which the State must prove beyond a reasonable doubt is that the material taken as a whole lacks serious literary, or serious artistic, or serious political, or serious scientific value."

The Petitioner did not request any instructions which were substantially different from the instruction given on this point and the Petitioner did not object to this portion of the instructions. Nevertheless, following this Court's decision in *Pope v. Illinois*, 481 U.S ___, 107 S. Ct. 1918 (1987), Ms. Anderson petitioned the Supreme Court of North Carolina to review the issue of whether this instruction violated the holding in *Pope*. The Supreme Court of North Carolina granted that petition. A.P., p. A-13.

In disposing of this issue the Supreme Court of North Carolina noted that, unlike the trial court in *Pope*, the trial court here had not erroneously instructed the jury to apply contemporary community standards when determining the value of the materials in question. Instead, the trial court

simply failed to expressly instruct the jury that it must apply a "reasonable person" standard when determining the value of the material taken as a whole. Second, the Supreme Court of North Carolina noted that this Court had recognized that a trial court in an obscenity prosecution is not constitutionally obligated to expressly instruct the jury to utilize a "reasonable person" standard when determining the value of the material taken as a whole. *Pope v. Illinois,* 107 S. Ct. at 1921, n.3. Finally, the Supreme Court of North Carolina concluded that any error in the trial court's instructions "did not amount to prejudicial error." A.P., pp. A-21 to A-22. This determination was entirely consistent with this Court's decision to remand *Pope* to the Illinois Court of Appeals to consider whether the trial court's erroneous instructions constituted harmless error in that case. *Pope v. Illinois*, 107 S. Ct. at 1922-1923.

A review of the Supreme Court of North Carolina's opinion on this issue amply demonstrates that the court properly reviewed the instructions of the trial court in light of this Court's decision in *Pope* and determined that whatever error might have occurred was not prejudicial. Therefore, the Petitioner's claim that the Supreme Court of North Carolina's decision is in conflict with the holding in *Pope* is incorrect.

II. THE ALLEGED ERRORS IN THE TRIAL COURT'S DECISIONS REGARDING THE ADMISSION OF EVIDENCE AND PROSECUTOR'S ARGUMENTS DID NOT VIOLATE THE PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL.

The Petitioner has requested a writ of certiorari under 28 U.S.C. § 1257(3). Pursuant to that statute, this Court does "not sit as a court of criminal appeals to review state cases." *Burgett v. Texas*, 389 U.S. 109, 113 (1967). This Court's only power over state judicial proceedings is to correct them to the extent they incorrectly adjudge federal rights. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977). Questions regarding the admissibility of evidence and the conduct of prosecutors during closing argument are generally matters of state law and procedure which do not implicate

specific constitutional protections. *Burgett v. Texas*, 389 U.S. 109, 113-114 (1967); *Donnelly v. De Christoforo*, 416 U.S. 637, 642-644 (1974).

In order to bring the present petition within the scope of this Court's jurisdiction, Ms. Anderson claims that the trial court's decisions regarding the admission of her proffered expert opinion testimony and the prosecutor's arguments violated her Fourteenth Amendment right to due process. In order to constitute a denial of due process, however, the alleged errors must have been so egregious and prejudicial as to result in a deprivation of "that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

In the arguments set out below, the Respondent contends that the issues presented in the Petition do not even rise to the level of ordinary trial error. But, even if the trial court had erred on one or more of the points presented in the Petition, those errors did not deprive Ms. Anderson of her due process right to a fair trial. "The Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986). Insofar as the alleged errors did not so infect the Petitioner's trial with unfairness as to constitute a denial of due process, this Court should not issue a writ of certiorari under 28 U.S.C. § 1257(3).

III. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED THE TESTIMONY OF DR. SCOTT IS CONSISTENT WITH THIS COURT'S OPINIONS REGARDING THE ADMISSION OF EXPERT TESTIMONY IN OBSCENITY CASES AND THE RULES OF EVIDENCE.

During her case-in-chief Ms. Anderson introduced testimony from Dr. Scott that he had been employed by her to "determine what the tolerance level was in the community for adult materials." A.P., p. A-7. In accordance with those

instructions Dr. Scott testified that he conducted a study of businesses in the community that carried "adult materials." Dr. Scott testified at length as to how he conducted his "study," but when his testimony is considered in its entirety it is evident that his "study" was limited to determining the availability and accessibility in the community of those materials he defined as "adult materials." A.P., pp. A-8 to A-12. Dr. Scott defined "adult materials" as "extremely mild to naked shots of women [sic] breasts and vulva area and penis and so forth up where you have pictures of couples together where they are engaging in oral, anal and vaginal sex." A.P., p. A-8. This definition of "adult material" bears no relation to the materials at issue in this case. All the magazines which Ms. Anderson was charged with selling depict actual acts of vaginal, anal or oral intercourse on each and every page. A.P., p. A-10. The two magazines which Ms. Anderson was convicted of selling, "Ass Masters Special 3" and "Ass Masters Special 4", depict actual acts of anal intercourse on each and every page. The magazines contain little or no printed material.

Based upon Dr. Scott's study of the availability and accessibility of "adult materials" in the community, Ms. Anderson attempted to introduce Dr. Scott's opinion as to whether the materials at issue in this case depicted and described patently offensive sexual conduct specifically defined by N.C.G.S. § 14-190.1 (1985) and whether the materials at issue were patently offensive to the average adult in the community. A.P., pp. A-8 to A-9. The trial court sustained the State's objection to the proffered testimony. On appeal the Supreme Court of North Carolina refused to find that the trial court had abused its discretion in excluding this testimony. In support of its opinion the Supreme Court of North Carolina noted that:

> "Dr. Scott's study does not appear in any way to have focused on whether the average adult applying contemporary community standards would find magazines limited exclusively to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse' to be patently offensive."

A.P., p. A-10.

> "It is crystal clear from Dr. Scott's testimony that his study was designed to determine nothing more than the availability and accessibility of an extremely broad range of sexually suggestive materials which he described as 'adult material.'"

A.P., p. A-11.

> "Dr. Scott's study was simply too unfocused and unspecific to provide him with sufficient basis to give an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue to be patently offensive . . . . His testimony indicated that he made no effort in his study to identify or isolate any factors bearing on the average adult's reaction to materials that were limited to pictorial portrayals of actual acts of 'vaginal, anal or oral intercourse.'"

A.P., pp. A-11 to A-12.

In light of its determination that Dr. Scott's "study" was not sufficiently focused to provide him with any data which would indicate whether the average adult applying contemporary community standards would find the materials at issue to be patently offensive, the Supreme Court of North Carolina held that Dr. Scott was no better qualified than a jury to address this question, that his testimony could not assist the jury, and, therefore, the trial court properly exercised its discretion to exclude this testimony.

It is well established that expert testimony is admissible in obscenity trials. *Smith v. California*, 361 U.S. 147, 164-67 (1959); *Kaplan v. California*, 413 U.S. 115, 121-122 (1973); *Miller v. California*, 413 U.S. 15, 31 n.12 (1972). However, this Court has specifically held that a trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony."

Hamling v. United States, 418 U.S. 87, 108 (1974). Furthermore, this Court has refused to create special rules of evidence applicable only in those cases involving issues of obscenity. As this Court noted in *Hamling*:

> "Petitioners have very much the laboring oar in showing that [evidentary] rulings constitute reversible error, since 'in judicial trials, the whole tendency is to leave rulings as to the illuminating relevance of testimony largely to the discretion of the trial court that hears the evidence.'"

Id. at 124-125 (quoting *NLRB v. Donnelly Company*, 330 U.S. 219, 236 (1947)).

Under both United States and North Carolina law, expert opinion is admissible only when it "will assist the trier of the fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702; N.C.G.S. § 8C-1, Rule 702 (1986). Both United States and North Carolina law presume that expert testimony will be based on facts or data sufficient to support an opinion relevant to an issue before the jury. Fed. R. Evid. 703; N.C.G.S. § 8C-1, Rule 703 (1986). Furthermore, under United States and North Carolina law, if the facts or data which form the basis for the expert's opinion are not admissible in evidence, then the trial court must determine whether they are of a type reasonably relied upon by experts in forming opinions or inferences on the subject in question. *Id.* Finally, both United States and North Carolina law permit trial judges to exclude even relevant testimony if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury. Fed. R. Evid. 403; N.C.G.S. 8C-1, Rule 403 (1986).

In this case, Dr. Scott simply testified as to the availability and accessibility of "adult materials." This Court, however, has held that:

> [T]he availability of similar materials on the newsstands of the community does not automatically make them admissible as tending to prove the non-obscenity of the materials which the defen-

> dant is charged with circulating . . . . 'Mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities.'"

Hamling v. United States, 418 U.S. at 124-125 (quoting *United States v. Manarite*, 448 F.2d 583, 593 (2nd. Cir.), *cert. denied*, 404 U.S. 947 (1971)).

Insofar as the availability of similar materials is not probative of the obscene character of the material in issue, the trial court in this case did not abuse its discretion when it determined that Dr. Scott's study of availability and accessibility of "adult materials" failed to provide an adequate basis for his opinion regarding the patent offensiveness of the materials in question. The propriety of the trial court's decision to exclude this testimony becomes even more certain when the Court considers the fact that Dr. Scott's availability and accessibility "study" encompassed all the materials which he defined as "adult materials," including depictions of extremely mild sexual activity and mere nudity. A.P., p. A-8. Those materials are not at all similar to the magazines in question which "contain photographic depictions of actual 'acts of vaginal, anal or oral intercourse' on each and every page." A.P., pp. A-10 and A-11. Therefore, the facts which allegedly provided the basis for Dr. Scott's opinion were even less probative than the evidence which this Court held had been properly excluded in *Hamling v. United States*, 418 U.S. at 124-127.

After reviewing the applicable law and the record of Dr. Scott's testimony, the Supreme Court of North Carolina determined that Dr. Scott's study was too unfocused and unspecific to provide a sufficient basis for an expert opinion regarding whether the average adult applying contemporary community standards would find the magazines at issue in this case to be patently offensive. In short, the court found that Dr. Scott's testimony was the sort of evidence that this Court has noted to have "often made a mockery out of the otherwise sound concept of expert testimony." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973).

After thorough review, the Supreme Court of North Carolina determined that Dr. Scott was no better qualified than the jury to address the question at issue and his opinion would not assist the jury to understand the evidence or to determine any fact in issue. Therefore, the court ruled that the trial court had not abused its discretion when it excluded Dr. Scott's opinions from evidence. A.P., p. A-12. The Respondent contends that this decision is not in conflict with any decision of this Court and did not deprive Petitiioner of her due process right to a fair trial.

IV. THE SUPREME COURT OF NORTH CAROLINA'S HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT EXCLUDED PORTIONS OF DR. WINNICK'S TESTIMONY IS CONSISTENT WITH THIS COURT'S OPINIONS AND THE RULES OF EVIDENCE.

In her case-in-chief Ms. Anderson also attempted to introduce the results of a survey which Dr. Winnick had conducted in the Catawba County area. The questions in this survey were not designed to elicit any responses which would be relevant to the issue of whether the average adult applying contemporary community standards would find the material was patently offensive or appealed to a prurient interest in sex. Instead, after determining whether the person answering the survey lived in Catawba County, the survey first asked whether the interviewee believed that standards had changed in recent years so that depiction of nudity was more acceptable or less acceptable in movies and publications. A.P., p. A-13. The survey then asked one question in four different guises. That question was, in effect: Do you believe that consenting adults should have the right to purchase and view materials depicting every kind of sexual activity no matter how graphically depicted? The survey concluded with a question to determine whether the person being surveyed understood the terms used in the survey. A.P., pp. A-13 to A-14.

The trial court permitted Dr. Winnick to testify to the results of the question to determine whether the interviewee

was a resident of Catawba County, to the results of the question to determine whether the interviewee believed that the depiction of nudity and sex had recently become more or less acceptable, and to the results of the question to determine whether the interviewee understood the terms being used in the survey. The trial court, however, prohibited Dr. Winnick from testifying about any opinion that he might have had based upon responses to the other four questions on grounds that the testimony would not assist the jury to understand the evidence or to determine a fact in issue. On appeal the Supreme Court of North Carolina found that the trial court had not abused its discretion when it excluded this testimony. A.P., pp. A-13 to A-15.

In the opinion of the Supreme Court of North Carolina, the portion of the survey which was excluded from evidence "amounted to a little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1." A.P., p. A-15. The issue before the jury in this case was not whether consenting adults should have the right to purchase and view materials depicting every kind of sexual activity, but whether the materials which provided the basis for the charges against Petitioner were obscene as defined in N.C.G.S. § 14-190.1.* As this Court held in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973):

> "We categorically disapprove the theory, apparently adopted by the trial judge, that obscene, pornographic films acquire constitutional immunity from state regulations simply because they are exhibited for consenting adults only."

---

* The Supreme Court of North Carolina has held that the definition of obscenity incorporated in N.C.G.S. § 14-190.1 (1985) comports with the standards this Court established in *Miller v. California*, 413 U.S. 15 (1973). *Cinema I Video v. Thornburg*, 83 N.C.App. 544, 351 S.E.2d 305 (1986), aff'd. 320 N.C. 485, 358 S.E.2d 383 (1987). Petitioner does not challenge that holding in this case.

In presenting Dr. Winnick's testimony regarding his survey, Ms. Anderson was obviously attempting to confuse the jury with evidence of the consenting adult "defense." In light of that fact, the Supreme Court of North Carolina properly affirmed the trial court's decision to exclude this testimony, not only on grounds that it would not assist the jury to understand the evidence or determine a fact at issue, N.C.G.S. § 8C-1, Rule 702 (1986); Fed. R. Evid. 702, but also on the grounds that probative value of such evidence was substantially outweighed by the danger of confusing or misleading the jury, N.C.G.S. § 8C-1, Rule 403 (1986); Fed. R. Evid. 403. A.P., pp. A-14 to A-15. Therefore, the Supreme Court of North Carolina's holding on this issue is not in conflict with the opinions of this Court or the Federal Rules of Evidence and did not deprive the Petitioner of her due process right to a fair trial.

V. THE SUPREME COURT OF NORTH CAROLINA PROPERLY REFUSED TO REVERSE THE PETITIONER'S CONVICTION ON GROUNDS OF PROSECUTORIAL MISCONDUCT.

In *Berger v. United States*, 295 U.S. 78, 88 (1975) this Court stated that:

> "[The State's attorney] may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce the wrongful conviction as it is to use every legitimate means to bring about a just one."

However, in reversing the defendant's conviction in *Berger* the Court noted:

> "[W]e have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a prob-

> able cummulative effect on the jury which cannot be disregarded as inconsequential."

Id. at 89.

In contrast to the facts before the Court in *Berger*, the prosecutor's argument in this case was not undignified and intemperate nor did it contain improper insinuations and assertions calculated to mislead the jury. While the trial court did sustain some of the Petitioner's objections to prosecutor's arguments, the Supreme Court of North Carolina found that the prosecutors did not on those occasions attempt to circumvent the ruling of the trial court or return to the improper arguments. A.P., p. A-19. On other occasions the trial court overruled the Petitioner's objections and the Supreme Court of North Carolina found no error in those decisions. A.P., pp. A-16 to A-19. Moreover, prior to beginning his argument the prosecutor cautioned the jury that what he was about to say was neither evidence nor law and the trial court subsequently gave proper instructions on the law. A.P., p. A-17. *Cf. Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974).

In her petition, Ms. Anderson emphasizes the fact that, on one occasion in a long argument, one prosecutor argued:

> "I contend to you that it is obviously obscene, clearly obscene and patently offensive. Picture after picture of anal intercourse. What is more unhealthy than anal intercourse? How could it be anything but obscene?"

A.P., p. A-17. At this point the defense objected and the trial court overruled the objection. On appeal the Supreme Court of North Carolina held that this argument was within the latitude allowed counsel in closing argument and the trial court did not err in overruling the petitoner's objection. A.P., p. A-17. But even if this argument exceeds the wide latitude allowed counsel in closing argument, the prosecutor made this comment on only one occasion. This is not a case of pronounced and persistent misconduct calculated to inflame and mislead the jury. As this Court held in *Darden v. Wainwright*, 477 U.S. 168 (1986):

> "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' *Darden v. Wainwright*, 699 F.2d, at 1036. The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' *Donnelly v. DeChristoforo*, 416 U.S. 637."

Id. at 181.

The Supreme Court of North Carolina carefully reviewed the Petitioner's contentions regarding this argument and determined that, in light of the prosecution's entire argument and the trial court's instructions on the law, Ms. Anderson suffered no prejudice as a result of this argument. A.P., p. A-17. Consequently, the Respondent contends that the prosecutor's argument did not deprive the Petitioner of her due process right to a fair trial.

CONCLUSION

The Petitioner has failed to demonstrate that her trial was infected with error so egregious and fundamentally unfair that she was denied her right to due process. In fact, the Petitioner has failed to show that the decisions of the Supreme Court of North Carolina on any of the issues presented in the petition conflict with the applicable decisions of this Court or Federal law. Finally, the Petitioner has failed to show any other special or important reasons for granting a writ of certiorari in this case. Therefore, the Respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted, this 7th day of November, 1988.

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General

Thomas J. Ziko
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES was served upon counsel for Petitioner by depositing said copy in the United States Mail, postage prepaid, addressed as follows:

Paul J. Cambria, Jr.,
LIPSITZ, GREEN, FAHRINGER, ROLL,
SCHULLER & JAMES
One Niagara Square
Buffalo, New York 14202
Edward T. Hinson

Edward T. Hinson
JAMES, McELROY & DIEHL
600 South College Street
Charlotte, North Carolina 28202

This the 7th day of November, 1988.

LACY H. THORNBURG
Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387